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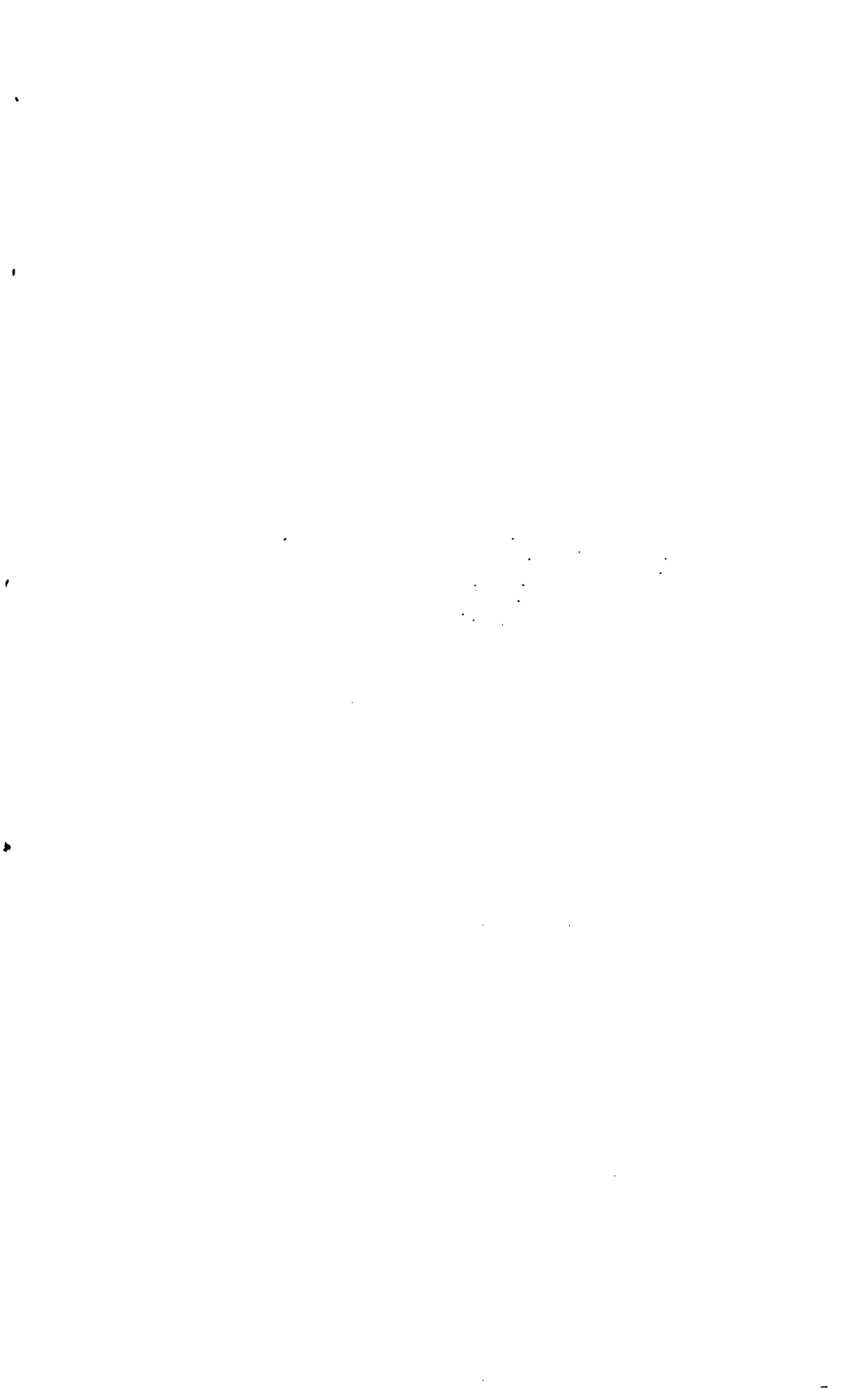
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REPORTS OF CASES^{c†}

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JUNE 7, 1887, TO AND
INCLUDING DECISIONS OF OCTOBER 4, 1887.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CVI. ' .

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REPLACEMENT

6/62

JUDGES OF THE COURT OF APPEALS.

WILLIAM C. RUGER, CHIEF JUDGE.

CHARLES ANDREWS,

CHARLES A. RAPALLO,

ROBERT EARL,

GEORGE F. DANFORTH,

FRANCIS M. FINCH,

RUFUS W. PECKHAM,

ASSOCIATE JUDGES.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK

Commencing June 7, 1887.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Appellant and Respondent, *v.* JOHN H. STARIN
et al., Respondents THE INDEPENDENT STEAMBOAT COM-
PANY, Appellant.

Any person who invades the rights of the owner of a ferry franchise by running a ferry himself, is liable for any damages he thus causes the owner and may be restrained by the court.

It seems, however, the courts will not restrain the operation of a ferry which is demanded by the public convenience simply because the franchise belongs to another, who neglects or refuses to use it.

A ferry is the continuation of a highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers with their teams and vehicles and such other property as they carry or have with them.

A ferry franchise does not include the carrying of freight and merchandise without the presence of the owners; this is the business of a common carrier and may be done without interference with such franchise.

A ferry franchise is property, and the sovereign power may make an irrevocable perpetual grant of it, the same as of any other property.

By the Montgomerie charter the city of New York received, not simply the political right to establish and regulate ferries, but the property in the ferry franchises from the "Island Manhattan's to any of the opposite shores all around the same island." The words "opposite shores" were not intended to limit the right granted to ferries from some point in the city to a point diametrically opposite, but the purpose was to secure to the city all the ferry franchises to and from it.

Accordingly *held*, that the grant included the ferry franchises and the exclusive right to control and receive the revenues of all ferries between the city and Staten Island.

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Statement of case.

The rule requiring all gratuitous grants by the sovereign of exclusive privileges and franchises to be construed strictly, and that any ambiguity therein must operate against the grantee, is not in its strictness fully applicable to the grant of a ferry franchise. Such a grant is never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry, with suitable accommodations, for the convenience of the public.

The rule also does not apply to the grants under said charter, as by the terms of the charter itself it is in all things to "be construed * * * benignly and in favor of and for the most and greatest advantage, profit and benefit" of the city.

While, if a practical construction by the parties interested, of ambiguous language in such a grant, as evidenced by their acts, has been uniform, it is entitled to great, if not controlling weight, if it has not been uniform, and such acts indicate conflicting views, they furnish no aid in arriving at the meaning.

The omission of the city to assert its rights under the charter, or passive submission to the invasion thereof, *held* to have but little bearing in the construction of the grant; but that the acts of the city in asserting and exercising its rights from time to time, claiming the exclusive franchise, conclusively showed its understanding of its rights under the charter.

It seems that the various statutes creating corporations to operate ferries between the city and Staten Island (Chap. 182, Laws of 1839; Chap. 363, Laws of 1845; Chap. 257, Laws of 1848), give no right to the corporations so organized to interfere with the franchises of the city, and before they could lawfully operate their ferries they were bound to acquire the right from the city.

Also, *held*, that where lessees from the city were engaged in operating ferries between the city and Staten Island, it was no defense in an action against one operating such a ferry in violation of the rights of the city, that it had not lawfully established a ferry to said island or executed a legal lease; that a mere wrong-doer was not in a position to assail the action of the city, and could not appropriate its franchises because it had not in the management of them observed the provisions of its charter; and that it was sufficient to authorize a judgment restraining such an invasion of its rights for the city to show that ferries, adequate for the public convenience, were in fact established and operated; and so, that its duties to the public as owner of the franchises had been discharged.

Also, *held*, the fact that the defendant in such an action had a coasting license did not give it authority to invade the ferry franchises of the city.

Also, *held*, that persons who had merely chartered steamboats to the company operating the unlawful ferry, to be used in the business, did not violate the rights of the city and were not proper parties to the action

Statement of case.

Also, *held*, that others who were mere servants or agents of said company, while they might in the discretion of the court be joined as defendants, were not necessary parties, and that this court could not review a dismissal of the complaint as to them.

(Argued April 28, 1887; decided June 7, 1887.)

THESE were cross appeals from a judgment of the General Term of the Superior Court, entered upon an order made December 16, 1886, which affirmed a judgment in favor of plaintiff against defendant, the Independent Steamboat Company, and against plaintiff in favor of the other defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Noah Davis, James McNamee and Adolph L. Pincoffs for defendant, appellant. Where an ancient document, such as a grant affecting public rights or interests is to be construed, and there exists any difference of opinion as to its extent and meaning, contemporaneous construction by official acts, or omissions to act, or in grants affecting the same subject matter, or usage or admissions, form the best and most convincing authority to which appeal can be made for a correct interpretation. (Dwarris on Statutes, 693; *People v. Mauran*, 5 Den. 389, 396; *People v. Dayton*, 55 N. Y. 375; *Canajos v. Trevino*, 6 Wall. 785; *Goodyear v. Cary*, 4 Blatchf. 271; *Smith v. People*, 47 N. Y. 339; *Easton v. Pickersgill*, 55 id. 315; *Knapp v. Warner*, 57 id. 668; *Drummond v. Attorney-General*, 2 H. of L. Cases, 681.) Any ambiguity in a grant of privileges must operate against the grantee and in favor of the public. (*Mayor, etc., v. Broadway R. R. Co.*, 97 N. Y. 281; *Langdon v. Mayor, etc.*, 93 id. 14, 8; *Mills v. St. Clair Co.*, 8 How. [U. S.], 569; *Fanning v. Gregoire*, 16 id. 524; *Auburn & Cato P. R. v. Douglaes*, 9 N. Y. 44; *Chas. River Bridge v. Warren Bridge*, 11 Pet. 545; *Letton v. Goode*, 14 Law T. Rep. (N. S.), 298; *Martin v. Waddell*, 16 Pet. 411; *East Hartf. v. Hartf. Co.*, 10 How. [U. S.], 531; *People ex rel. McCarthy v. French*, 10 Abb. [N. C.], 418; *Gutzweiller v. People*, 14 Ill. 142; *People v. Mayor, etc.*, 32 Barb. 102.) The legislature of the State has

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not regarded the Montgomerie charter as conferring power on the city of New York to establish ferries to and from Staten Island. (Laws of 1845, chap. 363; Laws of 1848, chap. 257; Laws of 1839, chap. 182.) A ferry to an opposite shore and its franchises are lawful. It is not necessary that the same party shall have a right of ferriage both ways. It is only necessary that the grantee have or acquire a right of landing on the shores. (*Conway v. Taylor's Exr's*, 1 Black. 603; *People v. Babcock*, 11 Wend. 587; *Powers v. Athens*, 99 N. Y. 592.) A grant of a ferry to an island does not carry the whole island and all its franchises to the grantee. (*Newton v. Cabbitt*, 12 C. B. [N. S.], 32; 13 id. 864; *Chas. River Bridge v. Warren Bridge*, 11 Pet. 471.) A mere grant of a ferry by general terms, must, from its nature, be confined to the landing places and the route through the water between them. (1 Ruff. 8 c. 30; 2 Inst. 58; 1 Mod. 104; Willes, 206, 1 Selk. 357; 2 Amst. 614; 10 Price, 369, 410, 453; 1 Dow. P. C. 322; *Hopkins v. G. N. Riv. Co.* L. R. 2 Q. B. D., 224; *Price v. Knott*, 8 Or. 443; *Matthews v. Peache*, 5 E. & B. 566.) The lease to the Rapid Transit Railroad Company is not only void for transcending the power of the city to grant and of the company to take, and because it gives the right to run ferries to no defined landing and to no terminus of the railroad company, but also because it attempts to create a monopoly altogether beyond that of a ferry, which cannot lawfully be done by the city. (Burrill's Law Dict.; *Charles River Bridge Case*, 11 Pet. 620, 622; *Alexandria Ferry Co. v. Wisch*, 73 Mo. 657; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210; *Mills v. Learn*, 2 Or. 215; *Prise v. Knott*, 8 id., 438; *Letton v. Goode*, 14 L. T. [N. S.] 298; *Wyckoff v. Queens County Ferry Co.* 52 N. Y. 32; *White v. Winnisimmet Co.*, 7 Cush. 155; *The Garden City*, 26 Fed. Rep. 766, 770; *Langdon v. Mayor, etc.*, 93 N. Y. 155; *Hopkins v. Gt. N. R. Co.*, L. R., 2 Q. B. D. 224.) General commerce between States or portions of States is not to be restricted or limited because some one has a ferry right which may be or has been incidentally affected by such commerce.

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(*Conway v. Taylor's Ex'rs*, 1 Black. 603.) No injunction can be granted in this suit unless the case of the complaint is made, and no penal law of the State binds the hands or shuts the mouths of the appellants from asserting any and every defense in their power to make or confer any right of action on the respondents. (*Charles River Bridge v. Warren Bridge*, 11 Pet. 623.)

James C. Carter for plaintiff. An actually existing ferry between designated points is a piece of property susceptible of seizin or possession. The plaintiffs were, by their license, in possession, under color, at least, of title, and with no objection on the part of the State. The defendants had no color of title. No one can run a ferry without the license of the State. (*Power v. Athens*, 99 N. Y. 592; *Chenango Bridge Co. v. Paige*, 83 id. 178.) A possessory action at law for damages for disturbing a ferry, would not afford complete relief. (*Blissert v. Hart*, Willes, 508; *Peter v. Kendal*, 6 B. & C. 703.) The gift and the control of such franchises is within the reserved authority of the States. (*Conway v. Taylor's Ex'r*, 1 Black. 603; *Gibbons v. Ogden*, 9 Wheat. 1.) Any exercise by the city of New York of the power by the Montgomerie charter conferred to establish future ferries would be valid. (*Coster v. Brush*, 25 Wend. 628; *Aiken v. Western R. Co.* 20 N. Y. 370.) The power to establish future ferries must still subsist in the sovereign, being a governmental power and duty which cannot be surrendered. (*People v. Mayor, etc.*, 32 Barb. 102.) It is exclusive by its very nature, whether so declared by their grant or not. (*Chas. River Bridge Co. v. Warren Bridge*, 13 Pet. 420, 620.) Where governmental powers are accompanied by grants of property, or property rights, they are not subject to revocation. (*Aiken v. Western R. Co.*, *supra*; *Benson v. Mayor, etc.*, 10 Barb. 223; 1 Hoffman's Estate and Rights of New York, 273; *Mayor, etc. v. N. E. Transfer Co.* 14 Blatch. 189; Kent's Notes to City Charter, note 30.) A ferry is a highway, and the establishment of it is both a governmental franchise and a

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governmental duty. (Woolrych on Ways, 217.) The words "opposite shores," as used in the *Montgomery charter*, mean surrounding shores. (*Hussey v. Field*, 1 Gale, 165, 169, 1 Abb. Law. Dic., 491.) Such a grant as was made to the city by the *Montgomery charter* must be construed in the mode best calculated to secure its public objects. (*In re Alton Woods*, 4 Rep. 45.)

W. W. MacFarland for plaintiff. A franchise of ferry is an incorporeal hereditament, and, in judgment of law, real property. (*Conway v. Taylor's Ex.*, 1 Black. 603, 632; 3 Kent's Comm. side page 458; *Patrick v. Ruffners*, 2 Rob. 209; *Aiken v. West. R. R. Corp.*, 20 N. Y. 370, *Smith v. Harkins*, 2 Ired. Eq. 613; *In re Fay*, 15 Pick. 252; 2 Wash. on Real Prop., 269; *Doty v. Gorham*, 5 Pick. 487; *Chambers v. Fury*, 1 Yates, 16; *Cooper v. Smith*, 9 Serg. & R. 26; *Mayor, etc. v. N. Y. & S. I. Ferry Co.*, 40 Supr. Ct. 245, 246.) Incorporeal property, such as a franchise of a ferry, admits, in legal intendment of the same exclusive possession as tangible property, whether real or personal, and in all cases what in law amounts to possession depends in the main upon the nature of the property and of its use. (*Beahp-land v. McKeen*, 28 Pa. 124; 70 Am. Dec. 715; *Hamilton v. Scull*, 25 Mo. 165; 69 Am. Dec. 460; *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 137.) Possession as against an intruder constitutes title. (Holmes on Com. Law, 244; Phillimore, Private Law among the Romans, 114; *Corp. of Hastings v. Ivall*, L. R. 19 Eq. 598; 13 Moak's Eng. Dec. 501, 525; *Alexander v. Hard*, 64 N. Y. 228; *Littlejohn v. Attrill*, 94 id. 619; *Tate v. Southard*, 3 Hawks, 119; 14 Am. Dec. 578; *Green v. Kellum*, 23 Penn. St. 254; 62 Am. Dec. 332; *Watson v. Gregg*, 10 Watts, 589; 36 Am. Dec. 176; *Conyers v. Keenan*, 4 Ga. 308; 48 Am. Dec. 226; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Dyson v. Collick*, 5 B. & Ald. 328; *Corp. of Hastings v. Ivall* L. R., 19 Eq. 558; 13 Moak's Eng. Dec. 501.) The plaintiffs were in possession. (*Ogden v. Gibbons*, 4 Johns. Ch. 160;

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3 Blackst. Com. 229; 2 Washb. on R. Prop. 270.) Ancient grants are interpreted by modern usage. (*Beaufort v. Corp. of Swansea*, 3 Ex. 413; *Corp. of Hastings v. Ivall*, 13 Moak's Eng. Rep. 526.) The rule that public grants should be construed strictly as against the grantee the defendants cannot invoke, for it applies as between the immediate parties, not to those claiming under them. (*Coleman v. Beach*, 97 N. Y. 545.) Plaintiff's title to the franchises is good. (*Mayor, etc., v. N. Y. & S. I. Ferry Co.*, 40 Supr. Ct. 232; *Mayor, etc., v. Ft. Lee Park, etc.*, 64 How. 30; *Coster v. Brush*, 25 Wend. 627; *Mayor, etc., v. N. Y. & N. E. Transfer Co.*, 14 Blatch. 159.) It is not material in what capacity the plaintiff took its title to the franchise in its public character and as one of the agencies of the sovereign power, or in its other capacity being in respect to proprietary rights and interests, as between itself and the State, that of a private and not a public corporation. (*Aiken v. West. R. R. Corp.* 20 N. Y. 370; *Minturn v. Larone*, 23 How. [U. S.] 435; *Benson v. Mayor, etc.*, 10 Barb. 223, 234; 2 Kent's Com. 275; *Bailey v. Mayor, etc.*, 3 Hill, 531, 540; *People v. Mayor, etc.*, 32 Barb. 112.) The possession of a United States license under the navigation laws has nothing to do with the question. (*Conway v. Taylor*, 1 Black, 603; *Starin v. New York*, 115 U. S. 248.)

James McNamee and *Adolph L. Pincoff's* for John H. Starin, and others, respondents. When the president, treasurer or directors of a corporation are made parties to a suit to enjoin certain action taken by the corporation, the rule is to consider their joinder as purely nominal. (*Pond v. Sibley*, 7 Fed. Rep., 129; *Hatch v. Chicago, R. I. & P. R. R. Co.*, 6 Blatch. 114; *Grover v. Swain*, 29 Hun, 454.) It was not within the power of the crown to grant as a private property right the exclusive right to ferry between two islands generally without any corresponding obligation to establish ferries, or to delegate irrevocably the right to control navigation. (*Newton v. Cubitt*, 12 C. B. [N. S.] 32; 13 C. B. [N. S.] 564; *Hopkins v. Gt. N.*

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Riv. Co., L. R., 21 Q. B. D. 223; *Smith v. City of Roch.*, 92 N. Y. 463.) A grant of the right to establish ferries between two islands generally without pointing out particular landing places, cannot be considered as conferring any private property right, or to be a grant of "a ferry." Such a construction would be repugnant to the nature of a ferry. (*Newton v. Cubitt*, 12 C. B. [N. S.] 32; 13 C. B. [N. S.] 864; *Matthews v. Peache*, 5 E. & B. 546; *Price v. Knott*, 8 Ore. 443.) If the grant in the Montgomerie charter was merely of a public right, the State had the right to revoke it, and it has exercised this right as far as ferries to Staten Island are concerned, even if they were originally embraced within such grant. (Laws of 1845, chap. 363; Laws of 1848, chap. 257, *Benson v. Mayor, etc.*, 10 Barb. 223; *People v. Mayor, etc.*, 32 id. 102; *Mayor, etc. v. N. Y. & S. I. Ferry Co.*, 40 Supr. Ct. 241, 248; *Darlington v. Mayor, etc.*, 31 N. Y. 164.) If the grant in the Montgomerie charter be considered as conferring any private property rights to ferries it must be strictly construed, as such rights are in the nature of a monopoly. (*C. R. Bridge v. Warren Bridge*, 11 Pet. 545; *Auburn & C. P. R. v. Douglas*, 9 N. Y. 444; *Letton v. Goode*, 14 L. T. [N. S.] 298.) Contemporaneous construction of the Montgomerie charter as to the ferry rights of the city, and acts in *pari materia* by provincial and city authorities are admissible to show the true nature and extent of such rights as contemporaneous evidence and as admissions against interest. (*People v. Dayton*, 55 N. Y. 375; *Canajos v. Trevino*, 6 Wall. 785; *Smith v. People*, 47 N. Y. 339; *Power v. Vil. of Athens*, 99 id. 601; *People v. Mauran*, 5 Dem. 389, 396; *Knapp v. Warner*, 57 N. Y. 668; *Mayor v. Hart*, 95 id. 451.) The result of the relief sought by the plaintiff, viz., of a decree permanent by enjoining the defendants from conducting, without license from the plaintiffs, the transportation business between New York and Staten Island in the mode in which it has been conducted would be to hamper inter-state commerce, in violation of the provisions of the Constitution and laws of the United States. (*Gloucester Ferry Co. v. Penn.*,

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114 U. S. 203; "*The Daniel Ball*," 10 Wall. 557.) The defendants are not engaged in running a ferry, but in the ordinary business of transportation and in the coasting trade. (*Steamboat Co. v. Livingston*, 3 Cow. 754; "*Hazel Kirk*," 25 Fed. Rep. 708.) If a State franchise only is being violated, the State authorities in civil or penal actions can alone prosecute the offender. (*C. R. Bridge v. Warren Bridge*, 11 Pet. 623; General Ferry Act of March, 1779, 1 Webster, 163; 2 R. L. [1813] 210.)

EARL, J. This action was commenced to restrain the defendants from maintaining and operating a ferry between the city of New York and Staten Island.

The plaintiffs allege in their complaint that under what is called the Montgomerie charter, the city of New York has the exclusive ownership of the ferry franchise between it and Staten Island, and the exclusive right to establish and regulate the ferries, with power to let, sell or otherwise dispose of them; that in violation of its rights, the defendants were operating a ferry between New York and Staten Island, and that they thus intercepted and unlawfully appropriated profits, rents and ferriage fees which belonged to it; that before the commencement of the action it had duly established a ferry between it and Staten Island, which it had leased to the Staten Island Rapid Transit Railroad Company for a term of years, expiring on the 1st day of May, 1893, and that under and in consideration of such lease, it received from the Railroad Company an annual rent of \$10,000 for wharf privileges, together with fourteen and one-quarter per centum of the gross receipts of the ferry franchise; that by reason of the unlawful operation of the ferry by the defendants, the revenues and profits of the ferry established and leased by it were seriously diminished, and that unless the defendants were restrained from their unlawful operation of the ferry, it would suffer great damage and injury; and the plaintiffs prayed judgment that the defendants and each and every of them, and their agents and servants, be restrained by the order and

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injunction of the court from operating a ferry between the city and Staten Island, and that an account might be taken of the damages suffered by the city by reason of the unlawful operation of the ferry by the defendants.

Besides other matters and defenses alleged in their several answers, the defendants put in issue the claim of the city of the exclusive ownership of the ferry franchise between it and Staten Island, and its exclusive right to lease the ferries, and denied that they were operating any ferry, and alleged that they were engaged in the transportation of goods, merchandise and passengers upon the public waters between Staten Island and New York with steamboats, duly enrolled and licensed under the laws of the United States for carrying on a coasting trade.

The issues thus framed were brought to trial at a Special Term of the Supreme Court, which decided the case in favor of the plaintiffs as against the Independent Steamboat Company, and dismissed the complaint as to the other defendants. A judgment was entered against the Independent Steamboat Company perpetually restraining it from operating any ferry between the city and Staten Island, and adjudging that it should pay to the city for the damages caused to it for its unlawful acts, the sum of \$338.73, besides the costs of the action. From the judgment entered upon the decision of the Special Term against it, the Independent Steamboat Company appealed to the General Term, and the plaintiffs appealed from so much of the judgment as was adverse to them.

In the consideration of this case, it is important first to determine what a ferry is. In a general sense it is a highway overnarrow waters. In 2 Washburn on Real Property (3d ed.) 269 it is said: "Ferries, that is, rights of carrying passengers across streams, or bodies of water or arms of the sea, from one point to another, for a compensation paid by way of a toll, are, by common law, deemed to be franchises, and cannot in England be set up without the king's license, and in this country without a grant of the legislature as representing the sovereign power, and do not belong to the riparian proprietors

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of the soil." A ferry franchise is property, an incorporeal hereditament, and as sacred as other property. (*Conway v. Taylor's Ex'rs*, 1 Black. 603). And the right to a ferry does not depend upon the right to, or the property in the waters over which it passes, or in the soil under the water, or upon the shore at either end of the ferry. (*Fay, Petitioner, etc.*, 15 Pick. 243, 253.) A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers, or of travelers with their teams and vehicles and such other property as they may carry or have with them. (*Broodnoz v. Baker*, 94 N. C. 675.) In a strictly ferry business, property is always transported only with the owner or custodian thereof; and ferrymen who do nothing but a ferry business, and have nothing but a ferry franchise are bound to transport no other property; and in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to due care and diligence. (*Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.) But they may combine, and usually do combine, with the ferry business, the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian like other carriers engaged in the transportation of such freight; and as to such freight, they are under the duties and obligations of a common carrier. As ferrymen, they are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property; and as common carriers, it is their duty to carry all freight and merchandise delivered to them.

No one has the right to set up a public ferry and charge tolls for the transportation of persons and property without the license of the sovereign. And at common law, it is believed, that one so doing was guilty of a crime, and he could be proceeded against by writ of *quo warranto*; and so by our Penal Code, it is enacted that "a person who maintains a ferry for profit or hire upon any waters within this State without authority of law, is punishable by a fine not exceeding \$25 for

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each time of crossing or running such ferry." (§ 416.) And any person who invades the franchise of another by running a ferry is liable for any damage he causes such other person, and may be restrained by the judgment of a competent court. The owner of a ferry franchise is bound to exercise his franchise for the public convenience, and if he fails to do so, his franchise may be forfeited by the sovereign for nonuser, and at common law he could be indicted. If he fails to establish and maintain a ferry, he could not in a civil action restrain any other person from operating the ferry, or recover any but nominal damages for his so doing. No court would restrain the operation of a ferry which was demanded by the public convenience, simply because the franchise belonged to another who neglected or refused to use it. So, also, if the owner of an exclusive ferry franchise does not establish sufficient accommodations for the public, he may be proceeded against by the sovereign and compelled to discharge his public duties, or his franchise may be forfeited.

It is therefore undisputed that if the plaintiffs have the ferry franchise which they claim, and the defendant, the Independent Steamboat Company, had established and was engaged in operating a ferry between New York and Staten Island, then this judgment was right and ought to be affirmed.

Manhattan Island, afterward the city of New York, is an island, formed by the Hudson River on the one side, and Spuyten Duyvel Creek, and the Harlem and East Rivers on the other sides; and Staten Island is in the waters south of New York, the nearest point of which is about five miles therefrom. It is about fourteen miles in length, eight miles in width at its widest point, and contains about fifty square miles.

The first charter of the city of New York was granted by Governor Nicolls on the 12th of June, 1665, but it contained nothing on the subject of ferries. On the 27th of April, 1686, Thomas Dongan, Lieutenant-Governor of New York, under King James the Second, gave to the city of New York what is known as the Dongan charter, granting a ferry which had

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before been established, now known as Fulton Ferry, from New York city to Long Island, defining the boundaries and jurisdiction of the city and granting full power "to establish, appoint, order and direct the establishing, making, laying out, ordering, amending and repairing of all streets, lanes, alleys, highways, water-courses, ferries and bridges in and throughout the said city of New York and Manhattan's Island." On the 23d of January, 1708, Cornelius Seberingh, of Nassau, now Long Island, presented to Viscount Cornbury, Governor of the Provinces of New York and New Jersey, a petition indorsed by many citizens, for letters-patent for another ferry between the city and Nassau Island, to the south of Fulton Ferry. On the 5th of February, 1708, the mayor, aldermen and commonalty of the city of New York presented their petition to Governor Cornbury, protesting against the grant of any ferry as prayed for by Seberingh, on the ground that the ferry between the city and Nassau Island had been theretofore granted to them by the Crown, and was now their property, and that to grant the petition of Seberingh would destroy their ancient ferry and remove the chief income and support of the corporation. This petition led to the refusal of Seberingh's request, and a petition of the city, presented April 8, 1708, effected the granting of what is known as the Cornbury charter, dated April 19, 1708. That charter was asked for and granted upon the theory previously expressed in a petition by the mayor, aldermen and commonalty to Governor Cornbury in 1702, that the Dongan charter gave only one ferry, which extended beyond the limits and jurisdiction of the city, viz.: the one now called Fulton Ferry; and the Cornbury charter, therefore, extended that grant so as to include the land under water to high-water mark on the Nassau Island side as far south as Red Hook, and the right to establish other ferries between the shores of Manhattan and Nassau Islands as far south as that point. On the 6th of November, 1712, the petition of John Dove and John Bellue, of Richmond county, which embraced Staten Island, to Robert Hunter, governor of the provinces of New York and New Jersey, praying for

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a license to the end that they might not be molested in operating their ferry from Sand Bay on the easternmost part of Richmond county to New York city, Long Island, and other adjacent places, was read in the governor's council. It is apparent that the ferry was already in operation. On April 2, 1713, Governor Hunter directed the preparation of letters patent to the petitioners for a ferry as prayed for, between Staten Island and New York city, and Staten Island and Long Island, for a term of twenty years; and on that day such letters-patent, with the right to receive ferriage fees, were accordingly granted to Dove and Bellue. In 1730, the mayor, aldermen and commonalty of the city of New York petitioned John Montgomerie, governor of the provinces of New York and New Jersey, for a new charter confirming and adding to their rights and privileges. In their petition they represented that the city "had grown large and populous and had a fair prospect of a numerous accession of inhabitants." And among other things they prayed that "the corporation aforesaid may have the sole power and authority of appointing ferries around this island, with the profits, benefits and advantages arising therefrom, with such fees as shall be regulated by act of assembly." Thereafter, the governor's council agreed that the petition, as presented, should be granted, with some modifications. The petition as to the ferries was agreed to except that the fees of ferriage should be such as should be appointed by the governor and council, or by act of assembly. Thereupon, Governor Montgomerie directed his majesty's attorney-general for the province of New York to prepare a patent for a charter to the city pursuant to the petition, and the report of the council thereon made and allowed and approved by the governor. Thereafter, in the same year, the letters patent, called the Montgomerie charter, were executed under the great seal of the province of New York and delivered to the city of New York. That charter, among other things, contained in section 15 the following provision: "And we do further, for us, our heirs and successors, give, grant and confirm unto the mayor, aldermen and commonalty of the said city of

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New York, and their successors forever, that the common council of the said city, for the time being, or the major part of them (but no other person or persons whomsoever, without the consent, grant or license of the said common council of the said city, for the time being, or the major part of them), from time to time, and at all times hereafter, shall and may have the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing, and shall and may settle, appoint, establish, order and direct such and so many ferries around Manhattan's Island, alias New York Island, for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan's to Nassau Island, and from thence back to Manhattan's; and also from the said Island Manhattan's to any of the opposite shores all around the same island, in such and so many places as the said common council, or the major part of them shall think fit, who have hereby, likewise, full power to let, set or otherwise dispose of, all or any of such ferries, to any person or persons whomsoever; and the rents, issues, profits, ferriages, fees and other advantages arising and accruing from all and every such ferries, we do hereby fully and freely for us, our heirs and successors, give and grant unto the mayor, aldermen, and commonalty of the city of New York, aforesaid, and their successors forever, to have, take, hold and enjoy the same to their own use, without being accountable to us, our heirs or successors, for the same or any part thereof."

The sovereign was competent to grant and the city to receive these ferry franchises. Such a franchise is property, and the sovereign power is just as able to make an irrevocable grant of it as of any other property. If it can grant a ferry franchise for a term of years, it can do so forever. By so doing it does not part with any political or governmental function. It still may regulate the conduct of the ferry for the public good and control the tolls to be charged; and it can resume the proprietary right in the franchise only by exercising the right of eminent domain or by forfeiture enforced through regular judicial proceedings. By this grant the city did not merely

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receive the political right to establish and regulate ferries, but it received the property in the ferry franchises as it received the other property granted to it by its various charters; and we do not find any evidence in the record that what it so received it has ever lost or been deprived of.

The principal point to be determined in this case is the meaning of the words contained in the fifteenth section, "the opposite shores all around the same island," the contention of the defendants being that the shores of Staten Island are not opposite shores within the meaning of the grant.

At the date of the Montgomerie charter Staten Island contained about 1,800 inhabitants, and the city of New York about 8,000. New York was then a growing and enterprising city with a brilliant future before it, and there was no other organized community of any considerable importance in its vicinity. It was an island, to be reached only by crossing the waters which surrounded it. The ferry which it already owned to Long Island yielded a large share of the revenue needed for the expenses of the city government. There had been other applications by individuals for ferry franchises, which might and probably would interfere with the revenues which the city was then receiving, and which might divert revenues which were needed by the city or might come to it for its municipal expenses if it owned and could control all the ferry franchises around the city. There was just as much reason for bestowing upon the city all the ferry franchises around it as the ferry franchises to Long Island. There was no reason whatever, while conferring upon it all the other ferry franchises, for excepting those between it and Staten Island. A ferry was already in existence between it and that island, and hence the ferry franchises between it and that island could not have escaped the attention of those who asked for and who made the grant. In its petition the corporation prayed for the exclusive ferry franchises "around the island." The minutes of the governor's council show that the language of the petition was carefully scrutinized, and they recommended that the exclusive ferry

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franchises "around the island," without any limitation or qualification, should be granted. The governor approved the action of his council and ordered the attorney-general to prepare a grant in pursuance thereof. There is no indication whatever that he intended to make any change in what the council had thus agreed to and recommended, and the inference is that the attorney-general, having no independent authority of his own to vary or limit the terms of the proposed grant, meant to embody in the grant or charter what the governor and council had agreed to. He was ordered to prepare a charter, giving to the city the exclusive ferry franchises "all around the island," and we must suppose he intended to obey that order, and that the language which he used was intended to embrace the ferry franchises all around the city. The language used indicates a plain intention to grant such ferry franchises, and the words "opposite shores" may have been inserted because under the Dongan charter the city had the right "to establish ferries and bridges in and throughout the said city of New York and Manhattens Island," and the words "opposite shores" may have been inserted to distinguish the ferries granted under the Montgomerie charter from those previously granted under the Dongan charter. The language as to the ferries in the Dongan charter was not without meaning, as there was at that time upon Manhattan Island a body of water two miles in circumference and fifty feet deep, having its outlet in the Hudson river, covering land where the commerce of a continent now ebbs and flows. But ferries, in a broad and general sense, always run across narrow waters between opposite shores. A highway comes to the water on one side and crosses by a ferry to the other side, which, according to the common and ordinary use of language, may be called the opposite side. Thus from whatever point a ferry could be operated to or from the city, it would be from one side of the water to the opposite shore on the other side. The persons who were concerned with this grant of ferry franchises

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did not intend to limit the right of the city to ferries from some point in the city to a point diametrically opposite. They were concerned with a grant for all time, and the plain purpose was to secure to the city all the ferry franchises to and from it.

Our construction of the fifteenth section of the charter as to ferries is made still clearer by a reference to the language of section 37. That is the section in which property rights are expressly granted to the city. It grants the City Hall and jail, market-houses, the great dock, crane, wharf, sewer, powder-house, "and the ferry and ferries on both sides of the East river, and all the ferries now and hereafter to be established all around the island of Manhattan's, and the management and rule of and all fees, ferriages and perquisites to the same or any part thereof belonging or to belong; and also the ferry-house on Nassau Island, with the barns, stables, pens or pounds, and lot of ground thereto belonging, and also all the grounds, soil and land between high water and low water mark on the said island of Nassau from the east side of the place called Wallabout to the west side of Red Hook, and also to make laws and rules for the governing and well ordering of all the ferries now erected or established, or hereafter to be erected or established around the said island of Manhattan's." Whatever doubt there might be as to the meaning of section 15 read alone, is removed when its language is considered in connection with the language of section 37, in which there is no limitation of ferry franchises to opposite shores, but in which such franchises are granted all around the island.

We are, therefore, of opinion that it is reasonably certain, taking into consideration the topographical situation of the city, all the circumstances attending the grant, the language used in the various documents, the two sections of the charter, and the purpose apparently sought to be accomplished, that the intention was that the city should have the exclusive ferry franchises all around the city, including the ferry franchises between it and Staten Island.

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We do not fail to recognize the rule of the common law which requires that all gratuitous grants by the sovereign of exclusive privileges and franchises should be strictly construed, and that any ambiguity in such grants must operate against the grantee and in favor of the sovereign or the public. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mayor, etc., v. Broadway, etc., R. R. Co.*, 97 N. Y. 275.) But this common law rule, in its strictness, is not fully applicable to the grant of a ferry franchise, because that is never without consideration, for it imposes upon the grantee the obligation to maintain a ferry with suitable accommodations for the convenience of the public (*Hussey v. Field*, Gale, 164; *Letton v. Good*, 14 Law Times Rep. [N. S.], 298); and for the further reason that the charter itself enjoins that it shall in all things "be construed, taken and expounded most benignly and in favor of and for the most and greatest advantage, profit and benefit of the said mayor, commonalty and the city of New York." The question is, what did the sovereign which owned these franchises and had the right to grant them mean by the language used? And so far as there is any ambiguity in that language, the injunction of the sovereign is that it shall be construed most benignly and favorably to the city.

But while there is scarcely a doubt as to the meaning of the language used, yet that meaning is not so absolutely certain that there is not room for construction. The defendants, therefore, claim that to ascertain the meaning of the language, and the extent and operation of the grant, resort may be had to the practical interpretation given to the grant by the subsequent acts and conduct of the parties in reference thereto. (*People v. Mauran*, 5 Denio, 389; *Goodyer v. Carry*, 4 Blatch. 271; *Smith v. People*, 47 N. Y. 330, 339; *Easton v. Pickersgill*, 55 id. 315; *Knapp v. Warner*, 57 id. 668; *Powers v. Village of Athens*, 99 id. 592, 601; *Duke of Beaufort v. Corporation of Swansey*, 3 Exch. 413; *Hastings v. Ivall*, L. R. 19 Eq. 598; *Canajor v. Trebind*, 6 Wall. 785; *Drummond v. Att'y-Gen'l*, 2 H. of L. 681; *Mayor, etc., v. Hart*, 95 N. Y. 443, 451.) If the practical construction of the charter by

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the parties interested, as evidenced by their acts, as to the ferry franchises granted thereby, had been uniform, it would have been entitled to great, if not controlling weight. But if that construction has not been uniform, and if the acts of the parties interested indicate conflicting views and speak an uncertain language and thus simply raise doubts, then they furnish no aid whatever, and throw no light upon our researches into the meaning of the provisions of the charter. It is to be noticed, in the first place, that no one ever expressly disputed the exclusive right of the city to these ferry franchises prior to 1878, when the defendant Starin first disputed it. The fact that the city, at any time, asserted its exclusive right to these ferry franchises is of far greater significance than the fact that on one or many occasions it failed to assert or enforce its right. The city might, on many occasions, from favoritism, corruption or inattention on the part of its officers, or because the ferry franchises were not sufficiently valuable to receive attention, omit to assert and enforce its rights. But omission to assert its rights, or passive submission to the invasion thereof, can have but little bearing in the construction of this grant. When, however, the city, from time to time, asserted and exercised its right, claiming the exclusive franchise, such acts show beyond question how the city understood its rights under the charter.

One or more ferries between New York and Staten Island were in operation at the date of the Montgomerie charter. On the 24th of November, 1747, one De Hart, of Staten Island, presented a petition, not to the city, but to the governor of the colony of New York under the crown, stating that he had been actually engaged in conducting a ferry from Staten Island to New York, and that other residents of Staten Island had threatened to set up other ferries to the injury of his ferry and praying his majesty's letters-patent to erect his ferry into a public ferry, and also a grant of certain vacant and unpatented land between high and low-water mark. At that time Chief Justice De Lancy, who is supposed to have been chiefly instrumental in procuring for the city the

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Montgomerie charter, and Edward Holland, the mayor of the city, were members of the governor's council. A petition and *caveat* in opposition to the petition of De Hart by owners of property on Staten Island and by persons who had been used to carry travelers from that island to the city, were presented to the governor. On the 7th of December, 1748, one Soloman Comes, who had purchased De Hart's farm and water front, and who had kept up the transportation business between that point and the city, renewed De Hart's petition to the governor, asking, however, not only the ferry franchise but also the land between high and low-water mark for one mile on each side of his water front. The petitioner and the parties opposed were heard by counsel on several different days before the governor's council, and after a full hearing the council advised the governor to grant the petition; and on the 14th of August, 1749, his majesty's letters-patent for the ferry thus recommended were granted to Comes. They granted to him the soil between high and low water mark as prayed for, and the exclusive franchise of a ferry between his land and the land for one mile westward thereof and the city for "twenty-one years and from the expiration of said term until letters-patent should be obtained for the establishing or keeping of a ferry or ferries within the mile or limits aforesaid."

It is undoubtedly a very significant fact, of which no satisfactory explanation can be given, that this petition should have been presented to the governor and not to the city, and that these letters-patent should have been granted by the governor, representing the crown, and that the rights of the city to these franchises under the Montgomerie charter should thus have been entirely ignored. As the mayor of the city was a member of the governor's council, this petition and the action thereon must have been fully known to the city, and yet no protest seems to have been made by the city against it. But the city up to that time had not yet established any ferry between New York and Staten Island, and it may have been supposed that until the city chose to exercise its franchise the concurrent

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power in reference thereto remained in the Crown. At that time the franchise could probably not be made a source of profit to the city, and it may have been supposed that it never could be made a source of revenue, and therefore it may be that the city did not deem it important to intervene or protest. But one of the main features of the petition and the letters-patent was the title to the land between high and low-water mark. That was deemed, evidently, one of the essential incidents to the ferry franchise prayed for, and the city was powerless to grant that, and that may furnish the reason why the petition was presented to the governor instead of the city. But whatever the reason was for the action of the governor and his council in granting these letters-patent, it does not appear that in the proceedings resulting in the patent any one questioned or disputed the right of the city under the Montgomerie charter. It does not appear that any ferry was set up or run by Comes under his patent, nor what became of the ferry franchise thus granted to him; and it is not claimed that it is now in existence in the ownership of any one. It is difficult at this late day, after the lapse of nearly 140 years, to determine precisely what significance the granting of these letters-patent to Comes should have. If there were nothing more, and particularly if the other acts of the sovereign power and the city were in harmony with this, the defendants would have much reason for the construction of the Montgomerie charter for which they contend. But five years and one-half after the granting of the letters-patent to Comes, on January 16, 1755, at a meeting of the common council of the city of New York, presided over by the mayor, Edward Holland, who was a member of the governor's council at the time of the granting of the letters-patent to Comes, a committee was appointed "to enquire into the properest method for the erecting and establishing of a ferry to and from this city to Staten Island and any other place." On the seventh of March thereafter, at a meeting of the common council, the committee thus appointed unanimously reported "that it is their opinion the best and properest method to let and to establish said ferry is

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to treat with those persons living on Staten Island who have a grant from the crown to ferry from said island to this city, or any other persons who incline to farm said ferry." The report was read and approved by the common council, and the same persons were appointed "a committee to treat with proper persons for the letting of the ferry to be erected and established to and from this city to Staten Island or any other place for a term of years, not exceeding five, and make report thereof to this board with all convenient speed." This action of the common council is very significant. It shows that the members thereof, including Mayor Holland, understood that the city possessed the right to farm and let the ferries between New York and Staten Island; and they clearly did not suppose that they were invading the prerogatives of their sovereign in assuming to establish and control such ferries. As the city did not own any landing place on Staten Island, it was doubtless deemed best to treat with persons living there who had landing places, and who but a short time before had received the ferry grant from the crown. The intention evidently was to give any persons who were then operating the ferry the preference; but if such persons refused to deal with the city then the intention was to farm the ferry to any persons who were inclined to take it. Here was a very significant assertion on the part of the city of its ownership and right to control the ferry franchises between the city and Staten Island. The records of the common council do not show any subsequent report of the final committee appointed to treat for the letting of the ferry or that the action of the common council resulted in the establishing of any ferry. There is no evidence that any action was thereafter taken by the common council until March, 1785, when the ferries from the city to Staten Island were put up for sale at vendue, and sold for the term of three years for twenty pounds per year. From 1823 to 1831, the city had a tenant who ran a ferry from the city to the north shore of Staten Island eight years. From 1827 to the commencement of this action, it had tenants who had been running a ferry from the east shore of Staten

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Island fifty-seven years ; and from 1877 to the commencement of this action it had tenants who ran a ferry which it established in 1875 to the north shore of Staten Island seven years. It is undoubtedly true that from 1730 to 1875, unauthorized ferries were from time to time run between the city and Staten Island. But during most of the time the population of Staten Island was so small, and the traffic and intercourse between it and New York so unimportant that the city could not derive any revenue by assuming control of the ferries. The public convenience was served if ferries were maintained and operated by any one. During a large portion of the time the city received some revenue, which may have been deemed satisfactory, from the rental of slips and wharves to persons who were operating the ferries. But during all this time, with the single exception of the grant to Comes, the sovereign authority never assumed to control or interfere with the ferry franchises between the city and Staten Island, and no one but the city assumed the right to establish ferries and let them. At all times after 1730, whenever the city saw fit to assume control over the ferries to Staten Island, or to establish them, or to create revenue by leasing them, it asserted its authority over them without any question or denial of its right from any quarter.

There is nothing, therefore, in the contemporaneous or subsequent treatment of these ferries by the city or in the practical construction of the grant contained in the Montgomerie charter, as evidenced by the acts of the city, or of the sovereign, which in any way limits the fair import of the language contained in the grant. The subsequent history of these ferries to which we have referred shows quite plainly that the city has at all times claimed the ferry franchises between it and Staten Island, but has not at all times seen fit to assert its claim. An appeal to such history, therefore, in no way sustains the contention of the defendants.

Our attention has been called to several acts of the legislature which are supposed to impugn the exclusive right of the city to the ferry franchises between it and Staten Island ; and they are chapter 182 of the Laws of 1839 ; chapter 363

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of the Laws of 1845 ; chapter 257 of the Laws of 1848. These acts were all similar, and their simple purpose was to create corporations to operate ferries between the city and Staten Island. But they gave no right to the corporations thus organized to interfere with the franchises of the city, or with the property of the littoral owners on Staten Island. Before the corporations thus formed could operate their ferries, they were just as much bound to acquire the right from the city as owner of the ferry franchises to operate the ferries as they were bound to acquire property for landing places at both ends of the ferry.

It may be that the legislature did not have in mind the rights of the city when these acts were passed, else they would have expressly saved such rights, as they did in the acts, chapter 315, Laws of 1849 ; chapter 680, Laws of 1873, and chapter 193, Laws of 1884. But it cannot be assumed that the legislature intended, by the acts of incorporation referred to, to unlawfully confiscate or interfere with the property rights of the city.

Our conclusion, therefore, is, that the city had the exclusive ownership of the ferry franchises between it and Staten Island and the right to establish, control and receive the revenues of all the ferries between the two places.

A further point is made on behalf of the defendants that the city had not lawfully established a ferry to Staten Island, and that it had not executed a legal lease of any ferry to the Staten Island Rapid Transit Railroad Company. The resolution establishing the ferry and the lease are assailed upon various grounds which it is not important particularly to notice. It is sufficient that the city owned all the ferry franchises to Staten Island, and that it was engaged in operating a ferry between it and several places on the shores of that island under a contract which gave it a share of the profits of the business. The defendants were wrong-doers, having no right whatever to operate a ferry between the same points on Staten Island and the city, and they are not in a position to assail the resolution or the lease or the arrangement between the city and

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the railroad company. If the resolution or lease is illegal or invalid, the question of the validity of the one or the other may be raised by the lessor or the lessee, or possibly by the suit of a taxpayer, or the attorney-general in the name of the people against the proper parties. But a mere wrong-doer, having no rights whatever, cannot appropriate the franchises of the city because it has not, in the management of them, observed the provisions of its charter. It is sufficient as against these defendants that ferries were in fact established and operated and thus that the duties of the city as owner of the franchises to the public were discharged.

If the city had failed to establish or cause to be operated any ferry for the public accommodation from any of the places between which and the city of New York the Independent Steamboat Company was operating its ferry, we would have had a different question to deal with. But no complaint is made that the ferry service between Staten Island and the city is not adequately performed under the city for the public convenience.

It cannot reasonably be questioned that the Independent Steamboat Company was operating a ferry between the city and Staten Island. It was engaged at regular times, with boats adapted to the purpose, in transporting, in consideration of tolls paid, travelers, with and without their personal property, over the waters between the city and that island. So far it was engaged in the ferry business, and its coasting license gave it no authority to invade the ferry franchises of the city. But it also carried on the business of a common carrier of freight between the city and the island, and that business it could do without any wrong to the city. The judgment, therefore, against the steamboat company is too broad, as it restrains the company from transporting any property between the city and Staten Island, whether such property be transported merely as freight or with the owner or custodian who accompanies the same.

The judgment of the court below dismissing the complaint as to all the defendants but the steamboat company should

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not be disturbed. Those of the defendants who merely chartered boats to the steamboat company, to be used in its business, did not violate the rights of the plaintiff and were in no sense proper parties to the action. The other defendants, who were mere agents and servants of the steamboat company, were not necessary parties, because they could be restrained by any injunction issued against the principal and master. (*Pond v. Sifley*, 7 Fed. R. 129; *Davis v. The Mayor of New York*, 1 Duer, 451; High on Injunctions, §§ 1435, 1438, 1440.) While the agents and servants in such a case may be joined as defendants, they need not necessarily be joined, and as the court below has not deemed their presence in this action as parties defendant necessary or important, we have no occasion to interfere with its determination in that respect.

In the very able and laborious briefs submitted to us, and in the arguments of the learned counsel, many views were expressed which we are not able to notice particularly without exceeding the reasonable limits of a judicial opinion. We have given them careful attention and think we have written enough to justify the conclusion which we have reached.

The judgment of the General Term should, upon the appeal of the Independent Steamboat Company, be modified as to the restraint imposed upon that company, so as to restrain it only from maintaining and operating any ferry between the city and Staten Island; and, as so modified, the judgment should be affirmed, without costs to either party upon that appeal. Upon the appeal of the plaintiffs from so much of the judgment as dismissed the complaint, the judgment should be affirmed, with one bill of costs to the respondents.

All concur.

Judgment accordingly.

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THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. THE NEW JERSEY STEAMBOAT
NAVIGATION COMPANY, Appellant.

A ferry may be established and operated over intervening waters where they are not so wide but that they can be traversed at regular and brief intervals by boats adapted to a ferry business.

There is nothing in the nature of a ferry business which requires that a ferry shall be operated from but one place on one shore to a single place upon the opposite shore.

Under the grant to the city of New York of ferry franchises by the Montgomerie charter, the city has authority to establish a ferry to run from one place in the city to several places on Staten Island.

The city, however, in the discharge of its duty as the owner of said franchises, is not bound to have more than one terminus for its Staten Island ferries in this city, unless it is made to appear that more than one is needed for the accommodation of the public.

In an action to restrain defendant, the N. J. S. T. Co., from infringing upon the ferry franchises belonging to the said city between it and Staten Island, it appeared that defendant was engaged in carrying passengers to and from the city, its boats stopping in going and returning at several places on Staten Island and at two places in New Jersey, the round trip being about twenty-four miles. *Held*, that the business of defendant did not lose its character as a ferry business because its boats stopped on the New Jersey shore; that while in the carriage of passengers from one place on the New Jersey shore or the Staten Island shore to another on the same shore, it was simply doing the business of a common carrier as its boats did not pass over intervening waters, it was engaged in a ferry business between every point at which its boats touched for passengers and the city; that so far as it was thus operating a ferry between the city and Staten Island it was unlawfully infringing upon the ferry franchises of the city; and that a judgment restraining such unlawful acts was proper.

Also, *held*, the fact that the terminus of defendant's ferry in the city was at a private pier, seven-eighths of a mile distant from the ferry terminus established by the city, did not affect the character of defendant's acts as an unlawful intrusion upon the rights of the city.

(Argued April 28, 1887 ; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 16, 1886, which affirmed a judgment

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in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to restrain an alleged infringement upon the ferry franchises of the city of New York by defendant, the New Jersey Steamboat Navigation Company, in running a ferry between said city and Staten Island.

The complaint alleged and the court found, in substance, that the city, in the exercise of the ferry franchises granted to it under and by the Montgomerie charter, had duly established a ferry between the foot of Whitehall street, in the city, and various places named on Staten Island and had leased the same; that said defendant was unlawfully engaged in operating a ferry between the city and Staten Island, thereby intercepting and unlawfully appropriating ferriage fees belonging to the city.

Further facts are stated in the opinion.

Noah Davis, James McNamee and Adolph L. Pincoffs for appellant.*

James C. Carter and W. W. MacFarland for respondent.*

EARL, J. The opinion in the case against the Independent Steamboat Company covers substantially all the questions which arise in this case, and but little more needs now to be written. The complaints in both cases are substantially alike, and so are the judgments rendered, except that the individual defendants in this case were by their own consent enjoined with the other defendants and they have not appealed.

The ferry established by the city, and operated under it, ran between the foot of White Hall street in the city and New Brighton, Sailors' Snug Harbor, West Brighton, Port Richmond, Elm Park, all places on the north shore of Staten Island; and the unauthorized ferry operated by the Independent Steamboat Company ran between pier 18 on the Hudson river in the city, and the same places on the shore of Staten Island. The ferry operated by the New Jersey Steamboat

* The points in this case were substantially the same as those in *Mayor v. Starin* (*ante*, p. 1):

Transportation Company started from the same pier in the city, and ran thence to the city of Bayon in the State of New Jersey, on the north shore of the Kill Von Kull to West Brighton, thence to Port Richmond, thence to Elm Park, and thence to Elizabeth Port, New Jersey, then it returned, stopping at the same places, to the same pier, the round trip being about twenty-four miles.

The right of the defendant to operate a ferry between the city and any places on the coast of New Jersey is not involved in this action. The sole question is whether it had the right to operate the ferry between the city and Staten Island.

The fact that the terminus of the ferry in the city was at a private pier seven-eighths of a mile distant from the ferry terminus established by the city, can make no difference. The city, in the discharge of its duty as the owner of the ferry franchises, was not bound to have more than one terminus for its Staten Island ferries in the city. It is not shown nor claimed that more than one was needed there for the accommodation of the public; and it does not appear that passengers and freight were not sufficiently accommodated by the terminus established by the city.

The distance of Elm Park, or even of Elizabeth Port, from the city is not so great that a ferry could not be established and operated between it and the city. Ferries to Elizabeth Port have been operated and known as ferries for more than 100 years, and it appears never to have been doubted that ferries could be operated between the two places.

It is impossible, in a general way, to specify to what distance, over intervening waters, ferries may be operated. A ferry could not be established between New York and Boston or New York and Newport or Philadelphia. The distance would be too great and the business of transporting passengers and freight upon public waters. But when the intervening waters are not wide and can be traversed at regular and brief intervals by boats adapted to a ferry business, there can be no question that ferries may be established and operated.

The business of the defendant did not lose its character as a ferry business because its boats in their passages stopped at places upon the New Jersey shore as well as at places upon the Staten Island shore. It was undoubtedly engaged in a ferry business between every point at which its boats touched for passengers and the city. In the carriage of passengers from one place on the New Jersey shore or the Staten Island shore to other places on the same shore, it was simply doing the business of a common carrier as its boats did not pass over intervening waters. But in going from the city its boats could leave passengers from the city at each of the places at which they stopped, and so in returning they could take passengers at each of the places and carry them to the city, and in doing this they would be engaged in a ferry business. There is nothing in the nature of a ferry business which requires that a ferry should be operated from but one place upon one shore to a single place upon the opposite shore.

There was nothing in the structure of the defendant's boats which deprived them of the character of ferry boats. They were adapted to carry travelers with their horses, vehicles and other property, and hence they could engage in a ferry business.

So, too, it cannot be successfully contended that the city could not lawfully establish a ferry which was to run from one place in the city to several places on Staten Island. If it had a single franchise for but one ferry between it and Staten Island, perhaps it could not do so, but as it owned all the franchises between it and Staten Island it could discharge its duty to the public as owner by establishing one ferry with as many termini upon the shores of Staten Island as there were landing places. Different questions would be presented for consideration if the Staten Island Rapid Transit Railroad Company were plaintiff claiming a franchise simply to run a ferry between the city and Staten Island.

We, therefore, see no reason to distinguish this case from that against the Independent Steamboat Company. The judgment in this case as in that is too broad and it should be

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modified as to the restraint imposed so as to restrain the company from maintaining and operating a ferry between the city and Staten Island, and affirmed, as thus modified, without costs to either party upon this appeal.

All concur.

Judgment accordingly.

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133 136

JOSEPH B. MOORS, Appellant, v. HENRY P. KIDDER et. al.,
Respondents.

Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid.

S. and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B. & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co., and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, were thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B. & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. *Held* that B. Bros. & Co. were owners of the property.

In the ordinary course of business the shellac was brought to the custom house in New York and into the "general order" stores. On application of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom house, and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff

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as security for a loan, the latter relying upon the representations of S. and the ware house receipt. *Held*, that plaintiff acquired no title to the property; and that an action to recover possession thereof was not maintainable.

(Argued March 25, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 28, 1885, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial, and affirming an order denying a motion for a new trial. (Reported below, 34 Hun, 534.)

The action was brought against the members of the firm of Kidder, Peabody & Co., Baring Brothers & Co. and John B. Hobby, Sons & Co. to recover possession of 95 cases of shellac. Kidder, Peabody & Co. were bankers in Boston and agents of Baring Brothers & Co. John H. Hobby, Sons & Co. were warehousemen in New York.

On August 3, 1881, Kidder, Peabody & Co., as such agents, under an agreement with Paul M. Swain, issued a letter of credit, which was confirmed by their principals. The following are copies of the material portions of said instruments:

“KIDDER, PEABODY & Co.,
“40 STATE STREET,
“BOSTON, August 3, 1881. }

“MESSRS. C. C. BANCROFT & Co., Calcutta.

“DEAR SIRs.—You are hereby authorized to value on Messrs. Baring Bros. & Co., London, for account of Paul M. Swain, Esq., Boston, Mass., by bills at three (3) months sight for the cost of any shipment of goods via San Francisco and thence overland, or at three (3) to six (6) months sight for the cost of goods by any other route, direct, or under through bills of lading to Boston or New York, to the extent of three thousand pounds sterling (say £3,000 stg.), and we hereby agree with the drawers, endorsers and *bona fide* holders respectively of the bills drawn by virtue of this credit that the same shall be duly honored by Messrs. Baring Bros. &

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Co., upon presentation at their banking house in London, if drawn and negotiated within six (6) months from this date, and if accompanied by bills of lading for such goods filled up to the order of Messrs. Baring Bros. & Co., and by invoice of the same to their order for the account of whom it may concern.

"A duplicate of such invoices with consular certificate attached, together with one bill of lading, to be sent direct to us either by vessel or mail.

"Very respectfully,

"Your obedient servants,

"KIDDER, PEABODY & CO.,

"Boston, *August 3, 1881.*

"Received the original of within letter of credit for three thousand pound sterling (say £3,000 stg.). In consideration whereof and of its confirmation by Messrs. Baring Bros. & Co., I hereby agree with Messrs. Baring Bros. & Co. and Messrs. Kidder, Peabody & Co., respectively, to provide in London sufficient funds to meet the payment at maturity of whatever bills may be drawn or negotiated by virtue of such credit, together with Messrs. Baring Bros. & Co., commission upon the amount of such bills. * * * And all property which shall be purchased by means of the within credit and the proceeds thereof and the policies of insurance thereon (which insurance to the amount of the value of such property we agree shall be duly effected), together with the bills of lading for the same are hereby pledged and hypothecated to Messrs. Baring Bros. & Co., as collateral security for the payment as above promised, and also of any other sums which may at the time being be owing by us to Messrs. Baring Bros. & Co., and shall be held subject to their order on demand with authority to take possession and dispose of the same at discretion for their security or reimbursement and so to take possession and dispose of the same, either by themselves or their agents or by Messrs. Peabody, Kidder & Co." * * *

(Signed)

PAUL M. SWAIN.

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Against the said credit C. C. Bancroft & Co., drew their bill of exchange for account of Swain, for the cost of a hundred cases of shellac, of which the property in controversy is a part, and attached it to a bill of lading for the shellac to the order of Messrs. Baring Bros. & Co., deliverable in New York. Baring Bros. & Co., accepted said bill of exchange and paid it at maturity.

On the eighteenth of November, Swain called at the office of Kidder, Peabody & Co., in Boston, and asked for the papers for the shellac, stating to Mr. Collins, the merchandise clerk for Kidder, Peabody & Co., that "he wanted to enter them at the custom-house and warehouse them for account of Baring Bros. & Co." Mr. Collins having obtained Mr. Peabody's consent, delivered the shipping papers to Swain, and received the following receipt and agreement in exchange for them :

" BOSTON, *November* 18, 1881

TO MESSRS. KIDDER, PEABODY & CO., BOSTON :

GENTLEMEN. - I acknowledge receipt from you, as attorneys for Messrs. Baring Bros. & Co., of invoice and bill of lading of

New York, one hundred (100) cases
shellac,

Rs. 15,678½

Shipped by C. C. Bancroft & Co., on board S. S. C/o "Manchester," at Calcutta, and consigned to the order of Messrs. Baring Bros. & Co., and indorsed by you, as their attorneys, to me. Such invoice and bill of lading are delivered to me for the purpose of enabling me to enter the goods referred to in them at the custom-house.

And I hereby agree to place the goods on storage for Messrs. Baring Bros. & Co., and subject to their order, and so that they may be applied to the due performance of the agreement contained in the receipt signed by me for your letter of credit on them, No. 2419, or any other letter of credit on them, through which such goods have been purchased, we agreeing to keep them covered by insurance against

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fire for account of and loss payable to Messrs. Baring Bros. & Co.

It is understood that the said goods are to be warehoused in the name of Messrs. Baring Bros. & Co., and warehouse receipts therefor handed to you for them.

Very respectfully,

Your obedient servant,

(Signed.)

PAUL M. SWAIN."

Instead of doing as so agreed, upon receiving the snipping papers, Swain entered these goods in the name of Wm. A. Brown & Co., his brokers, who obtained a certificate that they had made due entry of the shellac according to law, the goods being free from duty; and a permit was given to land the same.

On the nineteenth of November, Swain made application to plaintiff for a loan of \$6,000, and offered in his application to give as security among other things, ninety-five cases of the shellac, which he represented that he owned and would give a warehouse receipt for. The application, was accepted and a portion of the loan made on that day on other collaterals.

On the twenty-first, Swain gave an order on W. C. Casey, with whom the shellac was stored in New York, requesting him to deliver to the order of plaintiff, the ninety-five cases of shellac, and on the twenty-second he forwarded that order, with a letter to Casey, asking him to send a non-negotiable receipt to plaintiff's order. A receipt was sent as requested; on delivery of this to plaintiff, the balance of the sum loaned was advanced.

Further facts appear in the opinion.

Edmund Randolph Robinson, for appellant. The agreement must control, as expressing the intent of the parties and the legal effect of the transaction in creating the relation of pledgor and pledgee between Swain and Baring Bros. & Co., with respect to the goods in question. (*Haskins v. Paterson*, 1 Edm. S. Cas. 123.) Pledgees can only retain their lien by retaining possession, and when they deliver up possession to the pledgor, their lien ceases as against subsequent *bona fide* pur-

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chasers and pledgees from him. (Shouler on Bailments, 188; *McFarland v. Wheeler*, 26 Wend. 472-474; *Bigelow v. Heaton*, 6 Hill, 43; *Black v. Bogert*, 65 N. Y. 601; *R. R. Co. v. Sage*, 35 Hun, 95; *Hazard v. Fiske*, 83 N. Y. 293; *Casey v. Cavoroc*, 96 U. S. 467; *Barrett v. Cole*, 4 Jones Law [N. C.], 40; *Smith v. Sasser*, id. 43; *Bodenheimer v. Newson*, 5 id 107; *Way v. Davidson*, 12 Gray, 465, 467; *Kimball v. Huldreth*, 8 Allen, 167; *Thompson v. Dolliver*, 132 Mass. 103; *Russell v. Fillmore*, 15 Vt. 135; *Eastman v. Avery*, 23 Me. 248; *Beeman v. Lawton*, 37 id. 543; *Day v. Swift*, 48 id. 368; *Collins v. Buck*, 63 id. 459; *Shaw v. Wilshire*, 65 id. 485; *Cooper v. Ray*, 47 Ill. 53; 2 R. S. 135, § 5; id. 137, § 4; *Smith v. Acker*, 23 Wend. 653.) An agreement between the pledgee and general owner, even though made with entire good faith, which stipulates that the pledge is surrendered to the owner for a special purpose, and is to be restored to the pledgee when that special purpose is accomplished, does not protect his lien against the title of a purchaser or subsequent pledgee from the owner, while in possession, who had neither actual or constructive notice of the agreement. (*Bodenheimer v. Newson*, 5 Jones [N. C.], 107; *Way v. Davidson*, 12 Gray, 465, 467; *Geddes v. Bennett*, 6 La. An 516; *McFarland v. Wheeler*, 26 Wend. 467; *Pease v. Gloahec*, L. R., 1 P. C. App 219; *Smith v. Lynes*, 5 N. Y. 41; *Wait v. Green*, 36 id 556; *Durbrow v. McDonald*, 5 Bosw. 130; *Craig v. Marsh*, 5 Daly, 61; *Rawls v. Deshler*, 4 Abb. Ct. App. Dec. 12.) The statute against fraudulent conveyances creates in favor of *bona fide* purchasers a presumption against the good faith of every assignment of goods and chattels which is not followed by actual and continued change of possession. (*Smith v. Acker*, 23 Wend. 653; *Parshall v. Eggert*, 54 N. Y. 18; *Tilson v. Terwilliger*, 56 id. 273, Jones on Pledges, § 42; *Look v. Comstock*, 15 Wend. 244; *Hazard v. Fiske*, 83 N. Y. 287.) The plaintiff's title was valid under the factor's act, even if the defendants, Baring Bros. & Co. are to be treated as the general owners of the shellac, and Swain merely as their agent. (Chap. 179, § 3, Laws of

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1830; 4 Edm. St. 461; Public Stat. of Mass. [Ed. 1882], 417, chap. 71; *Cook v. Beal*, 1 Bosw. 497; *Pegram v. Carson*, 10 id. 505; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Bank v. Gardner*, 15 Gray, 362, 372, 374; *Stollenwerk v. Thatcher*, 115 Mass. 224.) It is competent to show by the course of business and the admission of one of the principals, that an agent is allowed by the principals to transcend the limit of the authority expressed in a written instrument, and, upon such evidence, a jury is justified in finding that an agent's real authority is more extensive than his expressed authority. (*Kolger v. Ins. Co.*, 10 Abb. Pr. [N. S.], 176; *Bunten v. Ins. Co.*, 4 Bosw. 254; *Pegram v. Carson*, 10 id. 505.) The rule that where an agreement is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to the parties to the agreement. (*Brown v. Thurber*, 77 N. Y. 613; 58 How. Pr., 95.) If Swain violated the confidence reposed in him by the defendants, who reposed the confidence and made him the custodian of the property, they should suffer rather than the plaintiff, who acted upon the appearances which the defendants had created. (*Bates v. Cunningham*, 12 Hun, 21; *Hazard v. Fiske*, 83 N. Y. 287, 293.) Under the circumstances the plaintiff was entitled to judgment for the possession of the shellac, or, in the alternative, for the sum, fixed as the amount to be paid by the defendants if possession thereof is not delivered to the plaintiff. (Code, §1730; *Young v. Willett*, 8 Bosw. 486; *Brewster v. Silliman*, 38 N. Y. 423; *Dows v. Rush*, 28 Barb. 157, 158.)

Charles B. Alexander for respondents. The title to the shellac was always in the defendants Baring Bros. & Co., and the plaintiff never acquired any rights therein. (*F. & M. Nat. Bk. of Buffalo v. Logan*, 74 N. Y. 573, 577, 578, 583, 585, *Bk. of Rochester v. Jones*, 4 id. 497; *Haille v. Smith*, 1 Bos. & Pull. 563; *First Nat. Bk. of Toledo v. Shaw*, 61 N. Y. 624.) Delivery of a bill of lading in trust for the payment of a draft did not give the person receiving it power to sell. (*F. & M. Nat. Bk. v. Hazeltine*, 78 N. Y. 104.) The

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pledge of the shellac by Swain was larceny. (*Bassett v. Spofford*, 45 N. Y. 387; *Zink v. People*, 77 id. 114; *Hentz v. Miller*, 94 id. 64; *Collins v. Ralli*, 20 Hun, 246; 85 N. Y. 637.) The Factor's Act only applies to the case of goods stored by the owner, or one who has a right to store them. (*Collins v. Ralli*, *supra*; *Kinsey v. Leggett*, 71 N. Y. 387; *Hazard v. Fiske*, 18 Hun, 277; 83 N. Y. 287.) The owner of property which has been tortiously taken from him is not estopped from reclaiming it by the fraudulent act of the tortious taker, to which he was not a party. (*Mar. Bk. of Buffalo v. Fisk*, 71 N. Y. 353; *Kinsey v. Leggett*, id. 395; *M. & T. Bk. v. F' & M. Bk.*, 60 id. 46; *First Nat. Bk. of Toledo v. Shaw*, 61 id. 300.) The Massachusetts statute does not help the plaintiff. (*Thatcher v. Moors*, 134 Mass. 156, *Stollenerwerk v. Thatcher*, 115 id. 224; *Nickerson v. Darrow*, 5 Allen, 419; *Mussey v. Beecher*, 3 Cush. 511; *Macomber v. Parker*, 14 Pick. 497; *Walker v. Staples*, 5 Allen, 34, *Thayer v. Dwight*, 104 Mass. 254; *Casey v. Cavaroc*, 96 U. S. 467; *Clark v. Iselin*, 21 Wall. 360; *Thompson v. Dolliver*, 132 Mass. 103; *Zuchtman v. Roberts*, 109 id. 53; *Ingalls v. Herrick*, 108 id. 351; *Thorndike v. Bath*, 114 id. 116, *Dempsey v. Gardner*, 127 id. 381; *Walcott v. Keith*, 2 Foster, 196; *Jenkyns v. Osborne*, 7 M. & G. 678; *Fuentes v. Montis*, L. R. 3 C. P. 268; 4 id. 93; *Stanley v. Gaylord*, 1 Cush. 536; *Moody v. Blake*, 117 Mass. 23; *Bearce v. Bowker*, 115 id. 129.) The advance was not made on the faith of the bill of lading. (*Cartwright v. Wilmerding*, 24 N. Y. 521; *Bates v. Cunningham*, 12 Hun, 21; *Collins v. Ralli*, 20 id. 246.) The delivery of the shellac to Swain, under the agreement in evidence, made him the special bailee or agent of defendants, and gave neither Swain nor any third parties dealing with him any greater rights than they would have had if defendants had retained possession of the bills of lading. (*Hays v. Riddle*, 1 Sandf. 248; *White v. Platt*, 5 Denio, 269; *Clark v. Iselin*, 21 Wall. 360; *Lewis v. Graham*, 4 Abb. Pr. 106; *Brownell v. Hawkins*, 4 Barb. 491; *Case v. Bramley*, 18 Hun, 187; *Union Trust Co. v. Regdon*, 93 Ill. 458.)

FINCH, J. The entire argument of the appellant turns upon the proposition that Swain was the general owner of the shellac, and the Barings merely pledgees. Upon that assumption the argument runs smoothly to its conclusion and encounters no serious obstacle. But the grave trouble is in the assumption itself, and the authorities which clash with it. The general subject was very thoroughly discussed in *Farmers and Mechanics' National Bank v. Logan* (74 N. Y., 568), and whether the doctrine there declared covers the facts now presented, and whether they have, or do not have vital distinguishing features, are the real subjects for our consideration.

The doctrine stated was, in substance, that where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase-price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase-price is paid. The authorities which sustain and the reasons which justify the doctrine need not be repeated, and it is required only that we determine whether it applies to and settles the case in hand.

There are some facts in the cited case which are not in this, and there are some in this which were not present in that; and to these and their effect attention must be directed. In that case the purchase was made by the brokers or agents of him who, as the ultimate vendee, may be termed conveniently, if somewhat inaccurately, the principal. Such brokers were buyers and sellers on commission, and it is said were the commercial correspondents to whom the rule refers and who needed and received its protection, while here the only commercial correspondents were Bancroft & Co. at Calcutta, who are not before the court and whose rights are not in question. But Bancroft & Co. were the sellers and not

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the buyers of the shellac in their relation to the parties concerned. They passed their title either to the Barings or Swain, and while they were commercial correspondents in some sense, they were not such within the rule under discussion, for they advanced nothing on the credit of the property, and parted with title instead of taking it. The Barings, although bankers, were equally commercial correspondents, and they took title through the bill of lading and bought the property on their own credit. But if Bancroft & Co. be treated as the commercial correspondents, the case is not changed. Like Sears & Daw in the *Logan Case*, they bought the shellac on their own credit or with their own money, and got reimbursement by drawing upon the Barings, transferring title to them by the invoice and bill of lading to their order, as Sears & Daw did to the discounting banker in the *Logan Case*. The difference in the manner of making the advances is not material. In each case the bankers became owners or pledgees.

In the *Logan Case* the purchasing correspondent took from the vendor a bill of sale, as well as a bill of lading to his own order, but the Barings took only the bill of lading if the invoice to their order was not tantamount to a bill of sale. We do not deem that difference, if it was one, at all material. The title passed as effectually by the latter paper alone as if it had been preceded by the former, for we have uniformly held that the bill of lading is the evidence of title and is sufficient to vest the ownership and absolute control in him to whose order it is drawn. The purchase in the case cited seems to have preceded the shipment so as to make natural and convenient a bill of sale covering the interim. If it had been intended in this case to vest the general ownership in Swain and make him the purchaser, a bill of sale to him, or an invoice to his order, might naturally have been made, but as to the Barings the purchase and the shipment were practically coincident.

In the cited case, again, the bill of lading, as attached to, and sent forward with the discounted draft, had stamped

upon it a statement addressed to the original principal, that the wheat and the insurance of it, were pledged to the plaintiff as security for the payment of the draft; and that the wheat was put into his custody, in trust, for that purpose, not to be diverted to any other use until the draft was paid, and that upon his accepting and paying the draft, the claim of the plaintiff would cease. This appears to have been an effort to put in words upon the bill of lading the legal meaning of the transaction. It was not necessary to the certainty or scope of that legal meaning, and amounted only to a precaution. A similar distinction was sought to be drawn in the cited case itself, between it and *First Nat. Bank of Toledo v. Shaw* (61 N. Y. 283; 69 id. 624). In that the bill of lading was, when forwarded, accompanied by a letter explicitly directing the property to be delivered only upon payment of the specified purchase-money. The comment of the court in the *Logan Case* was: "Such agreement was but putting into terms the legal effect of the transaction in the case before us, for we have shown by authority that the taking of the bill of lading in the name of the plaintiff for its account, and the discount of the draft by it on the strength thereof *did* transfer to it the title to the wheat." Indeed, it seems to me that the title of the then plaintiff was rather weakened than strengthened by the matter stamped upon the bill of lading, for it speaks of the transaction as a pledge, when in truth it was an ownership, and it appears to be for that reason that the court, in upholding the banker's title founded on the bill of lading, speak of the latter "even with the modification thereof made by the matter stamped upon it," and "even as modified." So that the absence of the special indorsement in the case at bar at least does not weaken the bearing of the *Logan Case* upon it.

But a much more important suggestion made by the appellant is founded upon the terms of the written agreement between Swain and Kidder, Peabody & Co., as agents of the Barings, which was intended to govern and control the entire transaction. They issued a letter of credit addressed to Bancroft & Co., and authorizing them for account of Swain to

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value on the Barings by bills for three thousand pounds sterling, and promised to accept and pay those bills "if accompanied by bills of lading for such goods filled up to the order of Messrs. Baring Bros. & Co., and by invoice of the same to their order, for account of whom it may concern." Swain, on his part, agreed to provide funds in London to meet such bills as should be drawn at their maturity, and that "all property which shall be purchased by means of the within credit, * * * together with the bills of lading for the same are hereby pledged and hypothecated, to Messrs. Baring Bros. & Co. as collateral security for the payment as above promised, * * * and shall be held subject to their order on demand, with authority to take possession and dispose of the same at discretion, for their security and reimbursement." The argument upon this provision rests upon the words "pledged and hypothecated" and "collateral security," and avers as a consequence that Swain was, within the contemplation of the parties, general owner of the shellac, and the Barings merely pledgees. It is observable that Swain did not so understand it, for in his testimony he said: "Kidder, Peabody & Co. were the owners of these goods till they arrived in Boston." It has already been mentioned that a similar expression was used by the plaintiff in the *Logan Case* in the matter stamped upon the bill of lading, describing the wheat as "pledged" to the plaintiff, and as "security" for the payment of the draft, and so little did the use of the inapt words affect the plain and unequivocal substance of the transaction in the mind of the court that the use of the word "pledged" was not even made the subject of remark. It is further quite evident that from the moment of the shipment and the delivery of the bill of lading the absolute *jus disponendi* was in Kidder, Peabody & Co. by the very terms of Swain's agreement. They were at liberty to "dispose" of the property "at discretion," and either for "security" or reimbursement. It is also to be noted that what is spoken of as "pledged" is not merely the goods or the property, but the bills of lading also. These documents carry the title as well

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as the right of possession, and the pledge or hypothecation is expressly applied to both. The meaning, assuredly, was that the title should pass. Very likely, as is suggested for the defendant, the transfer was rather in the nature of a mortgage in which the title passes than in that of a pledge in which the pledgor is general owner. Here, then, we have a case where no title was attempted to be given to Swain, where it was given to the Barings by the bill of lading to them, where they paid for the property by their own credit and money, where it was the very pith of the adventure that the shellac should furnish the means of meeting the price, where the invoice was to be made to their order, where the possession was to be theirs, where they were to have the right of disposal at discretion, and Swain was to have no control until payment of the draft. In such a case he could not be general owner, and an inference to that effect from an inapt expression cannot be indulged. So far the case, in our judgment, cannot be distinguished from that against *Logan*, upon the authority and reasoning of which the Barings must be deemed owners, and not merely pledgees.

The settlement of that point disposes of the case as affected by the factor's acts of this State and Massachusetts, except in a single respect. It is not pretended that plaintiff is protected under the provision which makes the transfer by an agent entrusted with the evidence of title and which has been made upon "the faith thereof" valid under some circumstances, even against the real owner; for the bill of lading with its endorsement was not shown to the plaintiff, and, in no manner affected his action. But the appellant insists that there was evidence enough to go to the jury that Swain was entrusted with the property for the purpose of a sale, or of obtaining advances upon it, and so, under the factor's act, the plaintiff's title as pledgee is to be protected. The course of business brought the shellac to the custom house and into the "general order" stores. From that custody it could only be removed by some action of Kidder, Peabody & Co. by force of their bill of lading. Swain applied for the papers to

Mr. Collins, who was their merchandise clerk, and who testifies: "I asked what he was going to do with the papers, and he said he wanted to enter them at the custom house and warehouse them for account of Baring Bros. & Co." Collins repeated that request to Peabody, who gave his consent. Thereupon Swain signed a receipt for the papers which specifies explicitly this one sole purpose for which they were put in his control, and, thereupon, they were indorsed in blank to enable Swain to make the entry and to warehouse the goods as agreed. Instead of doing that Swain entered them in the name of his broker, and then pledged them to plaintiff as security for a loan, the pledgee trusting to the representations of Swain and the warehouse receipt which he obtained. Peabody, so far as he was a party to the occurrence, fully corroborates Collins, and Swain was not thereafter called to deny, and did not deny, their version of the transaction. All that was later shown in rebuttal was a copy of the complaint in an action begun by Kidder, Peabody & Co. against Swain and Casey, who was the warehouseman. The opinion of the General Term shows so fully that the statements of that complaint, taken together, were, in no manner inconsistent with the evidence given for the defense as to make a repetition needless; and we may confine our attention to the evidence of Swain, and what it is claimed to establish.

Invariably the manner of dealing between the parties was like that developed in this case, so far as the written agreements were concerned. These were in two forms; one of them, that which we have described, which entrusted the shipping papers to Swain, solely that he might enter and warehouse the goods in the name of Barings, and the other which recited their sale and gave them into the custody of Swain to make delivery and collect the proceeds which were stipulated to "belong" to the Barings and to be handed over to them. Swain could not name a single instance in which one or the other of these papers was not signed by him, but it was sought to show by him that the action under them was loose and he was permitted to act differently. He said that

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he had been in the habit of entering the goods, sometimes in his own name, and of selling or pledging the goods and paying the proceeds long after to meet the drafts maturing in London. Under the second form of receipt a sale was contemplated and payment of proceeds over to Kidder, Peabody & Co., and that they did not demand them immediately upon the sale and often accepted them later although in time for the drafts shows simply their confidence in Swain, but did not make their money his, and serves sufficiently to explain Peabody's alleged admission that Swain had been permitted to do as he pleased. And it is noticeable that the one single instance in which Swain says he can remember the facts of the deviation from the written stipulation was one under the second form of receipt in which after a sale he did not deliver over the proceeds promptly upon obtaining them. But he admits that he never had any consent to warehouse the goods in any other name than that of Barings, and out of thirty-four instances in which the papers were put in evidence, Swain, with the aid of the books was able to name but four instances in which he warehoused in his own name and pledged the goods. He does not pretend that the fact came to the knowledge of Kidder, Peabody & Co., and any such knowledge is denied by them. The argument here is that they must have known, and the jury might have found that they did know. Our opinion is with that of the courts below, that such a finding would not have been warranted. All that Swain's evidence tends to show is, that in transactions under form No. 1, he often did not at once turn over the warehouse receipts and was not questioned about them, and in transactions under form No. 2, was not immediately called upon for the proceeds received. There was not enough to destroy the force, and work a modification in the written stipulations of the parties, and no verdict to that effect would have been justified.

The judgment should be affirmed with costs.

All concur except RAPALLO, EARL and PECKHAM, JJ., dissenting.

Judgment affirmed.

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WILLIAM H. NEARPASS as Trustee, etc., et al., Appellants, v.
FRANKLIN NEWMAN, Jr., et al., Respondents.

F., for the purpose of making provision for the support of his wife and children, entered into a tripartite agreement with her and J., as trustee, whereby he conveyed to J., certain land, in trust, to sell and convey the same, invest the proceeds and pay the income to her during her life. Subsequently the same parties entered into another agreement, which recited that F. desired to make still further provision for his wife and children, and for that purpose, on condition that the wife should perform certain covenants therein contained on her part, he agreed to quit-claim to J., "all his right, title and interest to and in" said land, and to pay J. \$300 a year for the support and education of each of two of said children until they respectively became of age; the deed and bill of sale to be put in *escrow*, to be delivered and to become operative and in full force and effect when the covenants on the part of the wife were performed; but to be returned to F., if not so performed. A quit-claim deed was executed by F., as agreed. J., thereafter sold the land and with a portion of the proceeds purchased a house and lot, which, by the terms of the deed, were conveyed to him "as trustee by and under a deed of trust" from F., and his wife; the balance was invested in U. S. bonds. Subsequently the same parties, with defendant F. N., Jr., as party of the fourth part, entered into an agreement which recited the receipt by J., under the first deed of trust, of certain property "in trust for certain purposes therein mentioned" the sale of said property and the investment of the proceeds as stated, that said defendant was to be substituted as trustee in place of J., and the conveyance by the latter to said defendant of said house and lot and delivery of the bonds. By the terms of the agreement, in consideration of the transfer, F. and wife released J. from all claims and demands, and said defendant agreed to take said house and lot "and hold the same as trustee pursuant to the covenants and conditions in said trust deed contained in the place" of J. By the conveyance referred to J., "individually, and as trustee" conveyed all his "right, title and interest in and to the house and lot to said defendant as trustee in place and stead" of J., "under said deed of trust." Said defendant thereafter acted as trustee until the death of the wife, which occurred after the two children named became of age. F. thereafter claiming a reversionary interest in the property so held by said defendant conveyed the same to plaintiffs. In an action to recover possession of said property *held*, that the effect of the first deed and trust agreement was to create a valid trust in J.; that the reversionary interest in the land remained in the creator of the trust and on the death of his wife reverted to him; that the land

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so conveyed was not exempted from the limitations and conditions of the trust by the subsequent deed and agreement between the same parties; that said limitations and conditions followed the property into which the estate was converted and it became subject to the same rule of reversion and that, therefore, the *corpus* of the trust estate reverted to F., and passed under the conveyance from him to plaintiff.

Also, *held*, that whatever effect might be ascribed to the quit-claim deed from F. to J., all of the interest thereby conveyed was reconveyed to said defendant F. N., Jr., by the last agreement, the original trust was redeclared and the whole property reconstituted a trust fund, subject to the limitations and conditions of the original agreement.

For the purpose of ascertaining the interest of parties in making a contract, invalid as well as valid, provisions in the contract may be resorted to.

(Argued April 22, 1887; decided June 7, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 9, 1884, which reversed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought to recover possession of certain real and personal property held by defendant Franklin Newman, Jr., to which plaintiffs claimed title under a conveyance from Franklin Newman.

The material facts are stated in the opinion.

Esek Cowen for appellants. The trust property reverted to the creator of the trust on the death of the *cestui que* trust. (2 R. S. [6th ed.] 1110, §§ 75, 80.)

John D. Pray and *Mr. Hubbard* for respondents. A delivery of a deed to a grantee named in it, though intended by the parties to be delivered as an *escrow* upon certain conditions, nevertheless, vests the title absolutely in the grantee. (*Worrall v. Munn*, 5 N. Y. 229; *Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 45; *Lawton v. Sager*, 11 Barb. 349, *Braman v. Bingham*, 26 N. Y. 483-492.) The deed effectually vested the reversion in John D. Neefus the grantee. (1 R. S. 748, § 1; 1 id. 739, § 142; *Jackson v. Fish*, 10 Johns. 455; *Lynch v. Livingston*, 6 N. Y. 422; *Ham v. Van Orden*, 84 id. 257; *Rockwell v. Brown*, 54 id. 213.)

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RUGER, Ch. J. The proof in the case is wholly documentary and the only question arising thereon is whether, upon a proper construction of the several instruments read in evidence, Franklin Newman retained a reversionary interest in the property thereby transferred after the trust purposes, for which he had conveyed it, were satisfied. Perhaps a more accurate statement of the question presented would be, whether certain real estate once conveyed by him to a trustee for specific purposes, was exempted from the limitations and conditions of the trust by a subsequent deed and agreement between the same parties.

The case shows that prior to the year 1864, Newman and his wife lived unhappily together and were desirous of making an arrangement by which they could live separately. They were the parents of four children whom it was thought desirable should reside with, and be supported by the mother. Newman had theretofore given to his wife \$9,000, and being willing to provide more largely for her support, on the 7th day of December, 1864, entered into a tripartite agreement with his wife and one John D. Neefus as trustee, whereby he conveyed to said Neefus and his successors and assigns, thirteen and one-half lots of land in the city of Brooklyn, to be held and used by such trustee for the following purposes and conditions, viz.: To sell and convey the same and invest the proceeds in bonds of the United States or of the State of New York, and pay the income thereof to Harriet Newman during her natural life for her support and that of her four children. This deed and agreement was duly recorded in the register's office of Kings county, December 9, 1864. Within a year thereafter the parties having determined that the peace and happiness of Newman and his wife and of their children would be promoted by an absolute divorce, on April 8, 1865, entered into another agreement between each other, and with Neefus for the purpose of promoting such divorce. In this agreement it was recited that Newman desired to make still further provision for his wife and children than was made in the previous trust deed, and for that purpose, upon condition

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that said Harriet should faithfully perform the covenants therein contained, agreed "to quit-claim to said Neefus all his right, title and interest to and in the certain thirteen and a half lots previously conveyed to said Neefus." He also agreed, upon the same condition, to give to Neefus, for the use of said Harriet, a bill of sale of certain furniture, to pay certain bills for board of the children, to pay Neefus \$300 a year for the support and education of each of two of Newman's children until they should, respectively, become of age, to execute and deliver his own bond for \$2,000, with collateral security, for the payment of such allowance. It then provided that "said quit-claim deed, also said bond with collateral, and the bill of sale, all to be put in *escrow* (said Neefus the party) to be delivered when said Harriet faithfully performs all her covenants hereinafter contained, but to be returned to said Newman if not so performed." Certain covenants are then made by Harriet that she will facilitate the proceedings for a divorce by all means in her power; that out of the provisions heretofore and herein made, she will support herself and her children, and that neither by herself or the children will she run up bills, or incur debts in Newman's name. It was further provided that in case Harriet should fail to perform her several covenants the agreement should be declared null and void, and Neefus should deliver back to Newman the quit-claim deed, bond and collateral, and bill of sale, but in case Harriet performed her covenants to facilitate such divorce, then said papers delivered to Neefus in *escrow* "shall become operative and in full force and effect." It is then further provided "that the furniture taken, together with the several valuable properties heretofore conveyed to said Harriet, or caused to be conveyed, or in trust for her and childrens' benefit, shall be and hereby is taken in full satisfaction, and bar of and to all or any claims whatsoever on said Newman, whether for her said Harriet's own or childrens' account." A quit-claim deed, dated April 17, 1865, from Newman to Neefus and to his heirs and assigns, of the thirteen and one half lots of land, was also put in evidence. This deed was

duly recorded in the clerk's office of Kings county, on April 18, 1865.

The next instrument in chronological order, was a warranty deed, dated April 13, 1868, from Mary Jarvis and David R. Jarvis, her husband, of a house and lot on Jefferson street, Brooklyn, to "John D. Neefus, as trustee by and under a deed of trust from Franklin and Harriet Newman," for the consideration of \$6,500.

Next follows an agreement made on January 18, 1872, between Franklin Newman of the first part, Harriet Newman of the second part, John D. Neefus of the third part, and Franklin Newman, Jr. of the fourth part. This agreement embraces the following recitals: "Whereas by a certain deed of trust made between the parties hereto of the first, second and third parts, bearing date the 7th day of December, 1864. * * * The said party of the third part received certain real and personal property in trust for certain purposes therein mentioned. And whereas such property so received in trust by said party has been sold and the proceeds thereof have all been invested in a house and lot in Jefferson street near Ormond place in the said city of Brooklyn, and in four United States six per cent bonds of \$1,000 each. And whereas at the request of the said parties of the first and second parts, and with the consent of the said parties of the third and fourth part, the said party of the fourth part, is to be substituted as trustee in the place and stead of the said party of the third part, subject to all the covenants and conditions in said trust deed contained. And whereas the said party of the third part has conveyed to said party of the fourth part by deed bearing even date herewith, the house and lot in Jefferson street, and has also simultaneously with the execution hereof, delivered to said party of the fourth part the said four United States bonds for \$1,000 each, being all the property, money or proceeds in the hands or possession of said party of the third part, nuder and pursuant to said deed of trust."

In consideration of the premises it was ther provided that

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the parties of the first and second part should release and discharge the party of the third part from all claims and demands whatsoever. The party of the third part did thereby also, in consideration of the premises, "transfer, assign and set over to said party of the fourth part, the said Jefferson street house and United States bonds and all and every right, claim or demand which he may or shall have for or by reason of said deed of trust, and the said party of the fourth part, in consideration of the conveyance to him of the said house and lot and of the delivery of said bonds, did "consent and agree to take said house and lot and bonds and hold the same as trustee, pursuant to the covenants and conditions in said trust deed contained, in the place and stead of the said party of the third part." On the same day "John D. Neefus individually, and as trustee, by and under a deed of trust from Franklin and Harriet Newman," and Mary Ann, his wife, conveyed by quit-claim deed, all of the estate, right, title and interest, both in law and equity, of, in or to the house and lot on Jefferson street to "Franklin Newman, Jr., as trustee in place and stead of said John D. Neefus, under said deed of trust," and to his successors and assigns forever.

From this time forward Franklin Newman, Jr., acted as trustee under the original trust deed, until the death of Harriet Newman which occurred in July, 1882. Harriet Newman left a will by which she demised all of her property to her daughter Mary and her son Franklin, and appointed her son Franklin sole executor of her will. On December 9, 1882, Franklin Newman, claiming to be the reversionary owner of the property held by Franklin Newman, Jr., conveyed it to the plaintiffs, and this action was brought by them to recover possession of the same. The effect of the deed and trust agreement of December, 1864, was to create a valid power in trust, to convert the land conveyed into money and invest the proceeds in securities in which Harriet Newman was to have a life estate only. (*Belmont v. O'Brien*, 12 N. Y. 394, 395.) The reversionary interest in the land not having been conveyed by such instrument

remained in the creator of the trust, and upon the death of Harriet Newman reverted to him under the provisions of the statute. (3 R. S. [7th ed.], p. 2182, § 62.)

It is also quite clear that the limitations and conditions of the attempted trust followed the property into which the estate was converted and it became subject to the same rules of reversion which pertained to that originally conveyed. (*Belmont v. O'Brien, supra.*) These propositions were assumed to be correct by both the General and Special Terms in their consideration of the case, and may be regarded as conclusively settled.

It was, however, held by the General Term that Franklin Newman, by the execution and delivery of the quit-claim deed of April 17, 1865, transferred to Neefus his reversionary interest in the trust fund, and that it then became vested absolutely in Neefus, and still remains in him, or the trustee Franklin Newman, Jr., who was substituted in his place. The defendants' answer alleges impliedly, if not directly, that this reversionary estate was held by the trustee for the benefit of Harriet Newman, and upon her death descended or was distributable to her three children and the issue of the fourth who had died. This contention is hardly sustainable in view of the fact that Harriet Newman left her property, by will, exclusively to two of said children, and any reversion to which she was entitled, is apparently controlled by its provisions. This result is claimed to be produced by the provisions of the agreement of April 8, 1865, which it is argued created a trust in the reversionary estate for the benefit of Harriet Newman.

We are of the opinion that no trust was created by that agreement and that under it Neefus acquired a mortgage interest only which became satisfied in 1871, by the performance of the obligation and the arrival of Franklin and Mary at maturity, and the termination of the period for paying annuities for their support. The case was considered at the General Term upon the theory that its termination depended solely upon the effect to be ascribed to the quit-claim deed, unaffected by the cotemporaneous agreement, and as thus

viewed, might afford some reason for doubt as to its true solution.

A careful consideration of the provisions of that agreement, however, leads to the conviction that there was no intention on the part of Newman or his wife to vest any personal interest in the property in Neefus. It was conveyed to him, indeed, but it was conveyed for a purpose, which it is the duty of the court to discover and enforce, if consistent with the rules of law. This purpose is clearly disclosed by an examination of the provisions of the agreement. Among other things, it appears therefrom that the sole consideration for the deed was furnished by Harriet Newman, and its object was declared to be "to make still further provision for said wife and four children." It was also provided that Neefus should reconvey the property to Newman in case the said Harriet "should fail to comply or perform in good faith her part of the covenants herein contained," and finally it was declared that "said quit-claim deed, also said bond with collateral and the bill of sale, all to be in *escrow* (said Neefus the party) to be delivered when said Harriet faithfully performs all her covenants hereinafter contained." The delivery here spoken of was a delivery to Neefus to take the place of the conditional delivery there made, because it obviously was not intended that Harriet Newman was to take Franklin Newman's bond or the judgment assigned as security therefor, or the bill of sale of the furniture transferred "for her use," which are therein spoken of in connection with the quit-claim deed. The idea that the property was to be reconveyed to Newman if Harriet failed to perform her contract is inconsistent with the theory of any personal interest in Neefus, while it was essential to the performance of his trust, as well as the enforcement of the security, that he should have the title of the property, with the power of converting it. On the other hand, if the reversion had been intended to be given to Neefus in trust for Harriet Newman, the legal estate would have vested immediately in her by force of the forty-ninth section of the statute, and the life estate and reversion uniting

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in the same person, the former would have merged in the latter, thus destroying the trust. That this was not intended is shown by the repeated declarations of the parties as to the continued existence of the trust of 1864. It matters not whether the provisions of the agreement were all valid or not, for when the object of the inquiry is to ascertain the intent of the parties in making a contract, their meaning is as much revealed by the intent expressed in invalid as in valid provisions, and the court will avail itself of every lawful means to ascertain and give effect to the intention of the parties, if not contrary to law. It seems quite clear, therefore, that the object of the deed was simply to furnish additional security to Harriet, that Franklin Newman should promptly make the additional payments of income which he became liable to pay by the agreement. It certainly was not intended that Neefus should take the reversionary interest for himself, and there is no color of a provision in the agreement by which Harriet Newman was entitled to take it. Neefus received the property in question simply as a security for the performance of Newman's agreement, to be returned to Newman when the object of the transfer had been satisfied. The practical construction given to this conveyance and agreement by the subsequent dealings and conduct of the parties, and the various contracts executed between them, is quite controlling as to their real intention in making it. The thirteen and one-half lots were converted into money, amounting, presumably, to about \$9,000. Six thousand five hundred dollars of this sum was invested in the house and lot on Jefferson street, the title to which was taken to Neefus, *as trustee under the trust deed of 1864*, and the balance in four per cent United States bonds.

By the agreement of January 18, 1872, it was recited that the properties were held by Neefus as trust property under the trust deed of 1864, and he thereby agreed to convey them to Franklin Newman, Jr., as substituted trustee subject to the conditions and limitations of the said trust, and the said Franklin Newman, Jr., received them solely as trustee under

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such instrument. The quit claim deed from Neefus to Franklin Newman, Jr., conveys all of the interest in the property held by Neefus, either individually or as trustee, to the grantee therein named *as trustee under such trust deed*. Whatever effect therefore may be ascribed to the deed of April 8, 1865, all of the interests thereby conveyed were reconveyed to Franklin Newman, Jr., and by the agreement of January 18, 1872, executed by all of the parties having an interest in the subject, and which was recorded in the register's office of Kings county, January 19, 1872, the trust was redeclared and the entire proceeds of the whole property were reconstituted a trust fund subject to the limitations and conditions of the deed and contract of December, 9, 1864.

It follows that upon the death of Harriet Newman, the *corpus* of the trust estate reverted to Franklin Newman and passed to the plaintiffs under the conveyance from him to them.

Other questions made in the case become immaterial in the view which we have taken of the questions raised.

The order of the General Term should be reversed and the judgment of the Special Term affirmed, with costs to the plaintiffs in the court below and in this court.

All concur.

Order reversed and judgment affirmed.

HUMPHREY SISSON et al., Respondents, v. CECILIA CUMMINGS et al., Impleaded, etc., Appellants.

E., a married woman, died seized of a lot of land, the south-west line of which, as described in the deed under which she held was near to high-water mark of the St. Lawrence river. The deed contained a reservation (so called therein) of all the grantor's rights "to the land now under water and to the water front beyond or south-west" of the south-west line of the lot conveyed. E. died intestate, leaving her husband and two infant children her surviving. In an action of ejectment, brought by the survivors, to recover the premises embraced in the reservation, the answer of the infants denied any entry by them upon

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or claim of title to any land except that of which their mother was seized at the time of her death, and no evidence was given tending to show possession of or assertion of title on their part to the premises in question; nor did it appear that their mother ever entered upon or claimed any right or interest in said premises. It did appear that after the death of E., her husband entered upon the said premises, erected structures thereon and tore down a wharf erected by plaintiffs. *Held*, that the infant defendants were improperly made parties; that their joinder as such was not justified by the Code of Civil Procedure (§ 1508), and the complaint should have been dismissed as to them; that they were not bound by the acts of their father, as these acts must be referred to his own interest and title as life tenant, not to the title of the remaindermen.

Sisson v. Cummings (35 Hun, 22) reversed.

(Argued April 27, 1887; decided June 7, 1887.)

APPEAL by defendants, Cecelia and James Cumming, from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 29, 1885, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury. (Reported below, 35 Hun, 22.)

This was an action of ejectment, to recover possession of a strip of land adjacent to and above low-water mark of the St. Lawrence river and lying south-west of and adjoining premises of the defendants.

The material facts are stated in the opinion.

Wayland F. Ford for appellants. The ebb or flow of the tide is not regarded as the test of navigability when applied to fresh water lakes, inland seas or the streams forming the boundary line of States. (*People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Canal Appraisers v. People*, 17 Wend. 598; *Browne v. Schofield*, 8 Barb. 243; *In re Genesee Chief*, 12 How. 454; *Barney v. Keokuk*, 94 U. S. 336; *Tomlin v. Dubuque R. R. Co.*, 32 Ia. 106; *Smith v. City of Rochester*, 92 N. Y. 479; *Mayor of Mobile v. Eslava*, 9 Porter [Ala.], 579; 33 Am. Dec. 325; *Collins v. Benbury*,

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3 Ired. L. 722; *Colstein v. Blazier*, 2 Bin. 475; 4 Am. Dec. 463; *Buff. P. Line v. N. Y. & L. E. R. R. Co.*, 10 Abb. [N. C.] 107; *La Plaisance Bay Harbor Co. v. City of Monroe*, 1 Walker's Ch. [Mich.] 155; *Smith v. City of Rochester*, 92 N. Y. 579; *The King v. Montague*, 4 B. & C. 598; *Miles v. Rose*, 5 Taunt. 705; *Rex v. Smith*, 2 Doug. 411; *Warren v. Mathers*, 6 Mod. 73; *Carter v. Murcott*, 4 Burrow, 2162; *Mayor, etc. v. Turner*, Cooper, 86; *Woolrych on Waters*, 40 [marg.]; *Gould on Waters*, 137, § 68.) On navigable waters the riparian rights cannot extend beyond high-water mark. (*Town of Ravenswood v. Fleming*, 22 W. Va. 52; *Mayor, etc. v. Esclava*, 9 Port. [Ala.] 579; 33 Am. Dec. 325; *Gould v. Hudson R. R. Co.*, 6 N. Y. 522; *People v. Canal Appraisers*, 33 N. Y. 493.) In considering the public character of the river St. Lawrence, the fact that it is a national boundary between the State of New York and a foreign country is important in determining whether it is to be regarded as a public navigable river, with all the incidents attached to that character. (*Canal Appraisers v. People*, 17 Wend. 598, 599; *Kingman v. Sparrow*, 12 Barb. 201.) In ejectment the plaintiff must rely upon the strength of his own title, not upon the weakness of the defendants. (*Hallane & Urry v. Harvey*, 4 Burr. 2487; *Wallace v. Swinton*, 64 N. Y. 188.) There could be no recovery for lands between high and low-water mark without title. (*Gould v. H. R. R. Co.*, 6 N. Y. 522; *Lansing v. Smith*, 4 Wend. 22; *People v. Mauran*, 15 Denio, 389; *Bennett v. Buchan*, 76 N. Y. 390; *Phelps v. Vischer*, 50 id. 69; *Thompkins v. Lee*, 59 id. 662.) An exception in a deed is always to be taken most favorably to the grantee. (*Jackson v. Gardner*, 8 Johns. 394; *Jackson v. Myers*, 3 id. 387; *Jackson v. Blodgett*, 16 id. 172; *Bowering v. Elmslie*, 7 T. R. 216, n.) To maintain the action of ejectment, it would be necessary to show defendants in possession exercising acts of ownership, or that they claimed the title. (*Redfield v. Utica & Syr. R. R. Co.*, 25 Barb. 54; *Abel v. Van Gelder*, 36 N. Y. 514; *Banyor v. Empie*, 5 Hill,

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48; *Lucas v. Johnson*, 8 Barb. 244; Code of Civ. Pro., §§ 1502, 1503.) There exists the same reason for limiting grants upon the St. Lawrence to high-water mark, as apply to other public waters. (*Halsey v. McCormick*, 13 N. Y. 298; *Murphy v. City of Brooklyn*, 98 id. 645; *Canal Appraisers v. People*, 17 Wend. 620, 621.)

Denis O'Brien for respondent. Ejectment will lie for and below high-water mark as well as for that above. (*Cham. & St. L. R. R. Co. v. Valentine*, 19 Barb. 484; *People v. Mauren*, 5 Denio, 389; *Nichols v. Lewis*, 15 Conn. 137.) The plaintiffs' right to recover is not affected by the fact that a portion of the land may be below high-water mark. (*Langdon v. Mayor, etc.*, 6 Abb. [N. C.] 314; *Bridge v. Pierson*, 45 N. Y. 601; *S. C.*, 66 Barb. 514; *Rexford v. Marquis*, 7 Lans. 249; *Salsburgh v. Hynds*, 13 Week. Dig. 359; *Jackson v. Vermilyea*, 6 Cow. 677; *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377; 3 Wash. Real Prop. [4th ed.], 431-433, [book 3; chap. 5, § 457]; *Munn v. Worrall*, 53 N. Y. 44; *State v. Wilson*, 42 Me. 9; *Whittaker v. Brown*, 46 Penn. St. 197; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 321.) Woodworth was estopped by his deed from claiming the strip of land in question. (*Van Rensselaer v. Kerney*, 11 How. [U. S.] 297; *Fitch v. Baldwin*, 17 Johns. 161; *Jackson v. Murray*, 7 id. 5; *Jackson v. Wilson*, 9 id. 92; *Brant v. Livermore*, 10 id. 358; *Sanford v. Roosa*, 12 id. 162; *Esterbrook v. Savage*, 21 Hun, 146; *Judd v. Seekins*, 62 N. Y. 266; *Bank of Troy v. Hibbard*, 45 How. Pr. 280; *Freeman v. Auld*, 44 N. Y. 50; *Ingraham v. Baldwin*, 9 id. 45; *Lee v. Clark*, 1 Hill, 56; *Fake v. Grant*, 39 Barb. 339; *Long Island R. R. Co. v. Conklin*, 29 N. Y. 572.) The defendants claiming under Woodworth are estopped by the provisions of his grant to the same extent that he would have been. (*Hill v. Hill*, 4 Barb. 419; *Stow v. Wyse*, 7 Conn. 214; *Chautauqua Co. B'k v. Risley*, 4 Denio, 480; *Demeyer v. Legg*, 18 Barb. 14; *West v. Pine*, 4 Wash. 691; *Carver v. Astor*, 4 Peters, 1; *Crane v. Morris*, 6 id. 598.) Riparian owners on fresh water

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lakes and rivers where the tide does not ebb and flow, own to low-water mark, although the water be navigable in fact. (*Wheeler v. Spinola*, 54 N. Y. 377; *Canal Com'rs v. People*, 5 Wend. 423, 443-447; *Handley v. Lessee of Anthony*, 5 Wheat. 374; *Waterman v. Johnson*, 13 Pick. 261; *Cham. & St. L. R. R. Co. v. Valentine*, 19 Barb. 484; *Halsey v. McCormack*, 13 N. Y. 296; *Child v. Storr*, 4 Hill, 369; Gould on Waters, § 203; 3 Wash. on Real Prop. [4th ed.] 414, 416; Angell on Water Courses, § 42; Hilliard on Real Prop. 189-202, and notes; *Ball v. Slack*, 2 Whar. 508; *Lehigh Valley R. R. Co. v. Trone*, 28 Penn. St. 206; *Bailey v. Miltonberger*, 31 id. 37; *Lessee of McCulloch v. Aten*, 2 Ohio, 307; *Lessee of Blanchard v. Porter*, 11 id. 138; 3 Kent's Com. 427; *Seneca Nat. of Indians v. Knight*, 23 N. Y. 498; *Yates v. Van De Bogert*, 56 id. 526; *People v. Canal Appraisers*, 33 id. 464; *Palmer v. Mulligan*, 3 Caine's, 308, 318, 319, *Smth v. City of Rochester*, 92 N. Y. 463, 486, *Ex parte Jennings*, 6 Cowen, 518.) From the facts the courts could well have found that the plaintiff had title to the land under water by prescription. (Code of Civ. Pro., § 370; *Corning v. Troy Iron and Nail Factory*, 44 N. Y. 577; *Trustees of East Hampton v. Kirk*, 68 id. 459, 466; *Towle v. Remsen*, 70 id. 303.) The finding that plaintiffs were the owners of the land under water is consistent with a title by prescription as an adverse possession, for the statutory period establishes a perfect title, and to uphold it a grant will be presumed. (*Cahill v. Palmer*, 45 N. Y. 479; *Jackson v. Wheat*, 18 John, 40; *Rubie v. Sedgwick*, 4 Abb. Dec. 73; *S. C.*, 35 Barb. 319; *Bogardus v. Trinity Church*, 4 Paige, 178.) The land under water of Otter creek recovered by plaintiffs, belonged to them subject to the rights of the public. The existence of a public easement did not deprive plaintiffs of the right to maintain ejectment against an individual ousting them from the use or possession. (83 N. Y. 178; 92 id. 484, 485; *East Haven v. Hemenway*, 7 Conn. 186, 203; *People v. Tibbitts*, 19 N. Y. 523, 528; *Blundell v. Cattarall*, 5 B. & A. 268; *Nichols v. Lewis*, 15 Conn. 137:

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Jackson v. May, 16 Johns. 184; *Jackson v. Buell*, 9 id. 298; *Brown v. Galley*, H. & D. 308; *Rowan v. Kelsey*, 18 Barb. 484; *Champ. & St. Lawrence R. R. Co. v. Valentine*, 19 id. 484; *People v. Mauren*, 5 Den. 389; *Thompkins v. Lee*, 59 N. Y. 662; *Phelps v. Vischer*, 50 id. 69; *Bennett v. Buchan*, 53 Barb. 578; Code of Civ. Pro., §§ 268, 272, 997, 1010, 1019, 1022, 1023.) The infants were properly made parties defendants, being the owners of the land, the title to the property in question could not be finally determined without their presence as parties, and it is now the policy of the law to have all the persons made parties that are necessary to a final determination of the questions involved. (Code of Civ. Pro. §§ 1502, 1503; *Stewart v. Parker*, 68 N. Y. 450, 455; *Martin v. Rector*, 30 Hun, 138.) It was proper to prove the manner the land between high and low-water mark had been used, not only as tending to establish title by prescription, but also the true boundary of the grant to plaintiffs; (*Duke of Beaufort v. Mayor, etc.*, 3 Exch. 413; *Rowe v. Brenton*, 3 M. & R. 329.) The owner of land on the St. Lawrence river takes at least to low-water mark. (*Lorman v. Benson*, 8 Mich. 18; *Jakeway v. Barrett*, 38 Vt. 316; *Fletcher v. Phelps*, 28 id. 257; *Austin v. Rutland R. R. Co.*, 45 id. 215; 19 Barb. 484; Gould on Waters, §§ 23, 203; *Rice v. Ruddiman*, 10 Mich. 125, 138; *Seaman v. Smith*, 24 Ill. 521; *Ld. Adv., etc. v. Ld. Blantyre* [4 App. Cas.], 33 Moak's Eng. R. 533; 3 Wash. R. Est. [4th ed.] 409, *Ledyard v. Ten Eyck*, 36 Barb. 125.) Whether the owner of land on the St. Lawrence river takes to high or low water mark is immaterial. (*Yates v. Milwaukee*, 10 Wall. 497; 31 Minn., 297; 47 Am. Rep., 789; 15 Conn., 137; 22 id. 181; 18 id. 391.) Ejectment will lie for a common appendant or appurtenant, when coupled with a suit for the lands to which it is appendant. (Tyler on Ejectment, 42; *Jackson v. Buell*, 9 John. 298.) The action may be maintained for a fishery. (*Rex v. Old Arlesford*, 1 Tr. Reps. 358; *Smith v. Burritt*, 1 Lev. 114; Cro. Jac., 1150; Runnington on Ejectment, 131.)

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ANDREWS, J. We deem it unnecessary to decide the interesting question argued at the bar, respecting the construction of a grant by the State of lands bordering on the river St. Lawrence above the ebb and flow of the tide, which bounds the granted premises by the margin or shore of the river, and whether under such a description the title of the grantee extends to the margin of the water at its low stage, or only to high-water mark. The judgment against the infant defendants, who are the only appellants here, must be reversed upon a preliminary question. Assuming that the plaintiffs' title under the Macomb patent extended to the line of low-water, and that they established title to the water front and to the land under water to low-water mark, lying south-west of and adjoining the premises embraced in the deed of July 5, 1861, from John W. Fuller to David and William Woodworth, under which the defendants claim, we think nevertheless the appellants were entitled to a dismissal of the complaint on the ground that it did not appear on the trial by the pleadings or evidence that they were in possession of the demanded premises, or claimed title thereto as remaindermen or otherwise at or before the time of the commencement of the action. Upon the death of Ellen Cumming, January 31, 1875, the title to the Woodworth lot descended to her two children, the infant defendants, subject to a life estate in Peter Cumming, the husband, as tenant by the courtesy. Ellen Cumming acquired title to the lot by deed from David Woodworth, November 10, 1871, which described the land by metes and bounds. The south-west line was near to high water mark on said river, but the river was not referred to in the description. By said deed the conveyance was made, subject to a reservation (so called) to Fuller (the original grantor of the Woodworths) contained in the original deed from Fuller to them, of "all his rights to the land now under water and to the water front beyond or south-west" of the south-west line of the lot conveyed. She entered into possession under her deed from Woodworth, and occupied the lot and the house upon it with her husband and children

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until her death. The premises in controversy are those embraced in this reservation. It neither appears that Ellen Cumming ever entered upon or that she claimed any right or interest in the premises in question. There is evidence that subsequent to her death Peter Cumming, her husband, one of the original defendants in the action, entered upon the premises in dispute and built a hog-pen and privy thereon, and tore down a wharf constructed by the plaintiffs between the lot conveyed to Ellen Cumming and the river. It may be admitted that enough was shown to entitle the plaintiffs to maintain ejectment against Peter Cumming. He has submitted to the judgment below and has not appealed, and his rights are not now in controversy. But the case discloses no ground upon which a judgment against the infant defendants can be supported. There is no pretense of any act on the part of the infants by way of assertion of title in themselves to the premises in question, nor is there any evidence that they have ever questioned or disputed the title of the plaintiffs. The complaint alleges that the defendants, after the death of Ellen Cumming, wrongfully entered into possession of the real estate described, and wrongfully withheld the same from the plaintiffs, and that the defendants, "*or some of them,*" claim to own the same, and deny the plaintiffs' title thereto. These allegations are not admitted by the infant defendants in the answer, but are denied, and they expressly aver that they have no interest in any lands except those of which their mother, Ellen Cumming, was seized at the time of her death, to wit, the lands embraced in the Woodworth deed, and they insist that the action cannot be maintained against them. It is clear, we think, that the infant defendants are not bound by the acts of their father, the tenant for life. It is true that both his rights and the rights of the infants in the land conveyed to Ellen Cumming are derived through her. But as we have said, the deed to Ellen Cumming carried no part of the premises in dispute, which lie wholly outside of the boundaries in the deed. The evidence also tends to show that Peter Cumming, in entering upon the land in controversy,

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was asserting a supposed right as riparian owner to use the shore between high and low water mark adjacent to his land. But his acts must be referred to his own interest and title, and not to the title of the remaindermen. The infants could not control his conduct, and it would be grossly unjust to make them responsible for wrongs committed by him without their sanction or authority.

The joinder of the infant defendants is not justified by section 1503 of the Code. That section authorized any person claiming title to, or the right to the possession of real property sought to be recovered in an action as landlord, remainderman, reversioner or otherwise, adversely to the plaintiff, to be joined as defendant. The infants, so far as appears, neither claimed title to or the right to the possession of the land in controversy, nor did they do any act in hostility to the plaintiffs' title, and the complaint as to them should have been dismissed.

The judgment should be reversed as to the appellants and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

THE PEOPLE ex rel., ISAAC W. PECK, Appellant, v. THE COMMISSIONERS OF THE DEPARTMENT OF FIRE AND BUILDINGS IN THE CITY OF BROOKLYN, Respondent.

Under the provision of the Code of Civil Procedure in reference to a hearing upon return to a writ of *certiorari* (§ 2138), which provides that the hearing must be had "upon the writ and return and the papers upon which the writ was granted" where the return admits the facts stated in the writ, or the papers upon which it was granted, or is silent as to them, such facts must be considered and have effect upon the hearing.

It seems where the return meets all the allegations of fact contained in the writ and the papers upon which it was granted and traverses them, the hearing must be confined to the facts stated in the return

Under the provision of the charter of the city of Brooklyn of 1873, (§§ 9, 14, title 13, chap 863 Laws of 1873), as amended by the act of

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1874 (§ 20, chap. 589 Laws of 1874), specifying the causes for which members of the Department of Fire and Buildings in the city of Brooklyn may be dismissed, before there can be any conviction and removal, the member proceeded against is entitled to notice of the charge against him, a hearing and trial.

Where, therefore, it appeared by the affidavit, writ and return herein, that the relator was, without trial or hearing, dismissed by the commissioners of said department from the position of detailed fireman and member of the department. *Held*, that the proceedings of the commissioners were erroneous and void.

(Argued May 3, 1887; decided June 7, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department made February 15, 1887, which affirmed an order of Special Term, affirming the proceedings of the defendant in removing the relator from his position as a member of the Department of Fire and Buildings in the city of Brooklyn.

The material facts are stated in the opinion.

Edward F. O'Dwyer for appellant. The appointment of the relator became a vested right of which he could only be deprived (divested), upon charge, trial and conviction. (Laws of 1873, chap. 863, tit. 13, § 14; *People ex rel. Munday v. B'd Fire Com'rs*, 72 N. Y. 445; *People ex rel. Folk v. B'd of Police*, 69 id. 408.) The repeal of the power of removal as expressed in section 9, act of 1873, is evidence of the intention of the legislature to limit the power of removal to the provision made therefor in section 14. (*Com'rs v. Keith*, 2 Barr. 218; *Potter's Dwarrris*, 204 [N.]; *Munday's Case*, 72 N. Y. 448; *Smith's Case*, 103 id. 370.)

Almet F. Jenks for respondent. The return was conclusive as to the status of the relator and the character of the position from which he was removed. (*People ex rel. Sims v. Fire Com'rs*, 73 N. Y. 439; *Haines v. Judges of Westchester*, 20 Wend. 625.) The removal of the relator was lawful. (Laws of 1873, chap. 863, tit. 13, § 9.) The power to appoint carries with it the power to remove. (*People ex rel. Sims*, 73 N. Y. 439.)

EARL, J. The petitioner presented to the Supreme Court a verified petition in which he represented that he was, and had been for a long time, a member of the department of fire and buildings of the city of Brooklyn; that on the 15th day of September, 1879, he was a duly appointed and acting detailed fireman of that department, having been appointed by the commissioners of that department; that on that day the commissioners irregularly, illegally and without authority or jurisdiction, and without cause, removed him from his position; and he prayed for a writ of *certiorari* directed to the commissioners commanding them to certify and return to the court all proceedings had before them in reference to his removal. Thereupon a writ of *certiorari* was granted, directed to such commissioners, reciting that Isaac W. Peck, a duly appointed and acting detailed fireman of the department of fire and buildings of the city of Brooklyn was, on the 15th day of September, 1879, removed by the commissioners of that department from such position, and commanding them to make return to the writ. In obedience to that writ the commissioners returned simply that, at a meeting of the board of commissioners, held September 15 1879, they adopted the following resolution.

“Resolved, That Isaac W. Peck, inspector of kerosene oil, be dismissed.”

The return did not deny that Peck, at the time of his dismissal, was a member of the department of fire and buildings of the city of Brooklyn, or that he had been duly appointed and was then acting as a detailed fireman of that department as alleged in his affidavit; neither did it deny the allegation in the writ that he was a duly appointed and acting detailed fireman of the department. It did not allege that Peck was appointed inspector of kerosene oil, or that that was the official position which he occupied in the department. Consistently, with the facts alleged in the affidavit and the writ, he was a fireman, detailed at the time of his dismissal as an inspector of kerosene oil. Indeed, nothing is returned except the fact of Peck's dismissal.

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The return, therefore, is a plain, unambiguous admission that while Peck occupied the position of detailed fireman in the department of fire and buildings in the city of Brooklyn, he was summarily dismissed by the resolution returned.

The practice prior to the adoption of the present Code required that the hearing upon the return to a writ of *certiorari* should be solely upon the return. (*People ex rel. Sims v. Fire Commissioners*, 73 N. Y. 437.) But by section 2138 of the present Code it is now required that the hearing upon the return to a writ of *certiorari* must be had "upon the writ and return and the papers upon which the writ was granted." Under this section, where the return meets all the allegations of fact contained in the writ, and the papers upon which it was granted, and traverses them, then the hearing must be confined to the facts stated in the return. But where the return admits the facts stated in the writ or the papers upon which it was granted, or is silent as to them, then such facts become important, and must be considered and have effect upon the hearing. (*People ex rel. McCarthy v. French*, 25 Hun, 111.)

Therefore, looking at these papers — the affidavit, writ and return — it appears that without any trial or hearing the commissioners summarily dismissed the relator from his position as a detailed fireman and member of the department of fire and buildings of the city of Brooklyn. The case, therefore, as it appears in the record, is precisely like that of *People ex rel. Smith v. Commissioners, etc.* (103 N. Y. 370), and upon that authority this appeal must prevail.

Since writing the above, the learned counsel for the respondents has submitted an additional brief, in which he makes for the first time the point that "there was no provision of law at the time of the removal of the relator which prohibited the dismissal of any member of the department of fire and buildings, whatever his position," and he claims that the point was not decided in the case of *People ex rel. Smith v. Commissioners, etc.*, because it was not there made, and that it was there assumed that removals could be

made only after convictions. We think it clear that the point is not well taken.

The Brooklyn charter act, chapter 863 of the Laws of 1873, title 13, section 14 provides as follows: "It shall be the duty of said commissioners to make suitable regulations under which the officers and men of the department shall be required to wear an appropriate uniform and badges, by which, in case of fire and at other times, the authority and relation of such officers and men may be known, and the commissioners shall have power, in their discretion, on conviction of a member of the department for any legal offense or neglect of duty, or violation of rules, or neglect or disobedience of orders or incapacity, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or other breach of discipline, to punish the offending party by reprimand, forfeiting or withholding pay for a specified time, or dismissal from the department, but no more than ten days' pay shall be forfeited and withheld for any offense."

This section standing alone specifies the cases in which, and the causes for which, dismissals may be made, and the plain implication is that they cannot be made in any other cases or for any other causes. The latin phrase *expressio unius exclusio alterius* furnishes the rule of construction which must be applied. By well settled rules applicable to such cases before there can be any conviction under this section the member proceeded against is entitled to notice of the charge made against him and to a hearing and trial. It would, therefore, be quite absurd to hold that a worthy and competent member of the department, who was guilty of no offense or delinquency of any kind, could be arbitrarily dismissed without a charge, hearing or trial, but that a member guilty of some of the offenses or delinquencies mentioned could be dismissed only after a trial and conviction.

But it is claimed that section 9 of the same title throws some light upon the meaning of section 14, and that section, as originally enacted in 1873, was as follows: "The said com-

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missioners shall have power to select a secretary, chief and assistant engineers, and as many officers, clerks, firemen, engineers, drivers, inspectors and bell ringers as may be declared necessary by the common council; and the same shall at all times be under the control of said commissioners, and perform such duties as may be imposed upon them by the said commissioners, and may be removed by said commissioners."

But the conflict between that section and section 14 having probably been perceived, the legislature the next year, by section 20 of chapter 589, amended section 9 to bring it into harmony with section 14 so as to make it read as follows: "The said commissioners shall have power to select a secretary, chief and assistant engineers, and as many officers, clerks, foremen, engineers, drivers, inspectors and bell ringers as may be necessary, provided that the salaries of such employes, in the aggregate, shall not exceed the amount annually raised by the proper officers for such purpose. The said employes shall at all times be under the control of said commissioners, and perform such duties as may be imposed upon them by the said commissioners." The omission from the section of the absolute power of removal is quite significant and leaves no doubt as to the proper construction of section 14.

The last paragraph of section 7 of the act, chapter 377 of the Laws of 1880, passed after the dismissal of the relator, made no new provision, but applied the prior law to the new state of things.

The orders of the General and Special Terms, and the proceedings of the commissioners of the department of fire and buildings of the city of Brooklyn, should be reversed, with costs to the relator in the Supreme Court and in this court.

All concur.

Ordered accordingly.

Statement of case.

WILLIAM A. LEWIS, Appellant and Respondent, *v.* **CHARLES. BARTON** et al., Appellants, **HELEN F. BARTON** et al., Respondents.

The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defense.

An indorser of a promissory note is not estopped from setting up usury as a defense thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full consideration and subject to no defense of usury or otherwise, where it appears that when the note was transferred to the holder, he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred.

Although it appears by the opinion of the General Term that a judgment in an action tried by the court was reversed upon the facts; yet if this does not appear in the order of reversal this court is bound to presume that the reversal was upon questions of law only

(Argued May 7, 1887; decided June 7, 1887.)

APPEAL on the part of plaintiff from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 31, 1884 (amended by order of January Term, 1885), which affirmed as to all of the defendants, except Charles Barton, a judgment in favor of defendants entered upon a decision of the court on trial at Special Term. Also appeal by said defendant Barton from that portion of the said order which reversed as to him the said judgment of Special Term and granted a new trial.

This action was brought to foreclose a mortgage executed by said defendant Barton and his wife, given to secure the payment of a promissory note made by Briggs Brothers and indorsed by said Barton. The defense was usury.

The material facts are stated in the opinion.

J. E. Roe for plaintiff. Usury is an affirmative defense, and it is not established by bare inference or suspicion. (*Valentine v. Connor*, 40 N. Y. 252; *Morris v. Talcott*, 96 id 107) Barton was estopped from saying that his contract

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of indorsement on the note was invalid. (*Mason v. Anthony*, 3 Keyes, 609; *Erwin v. Downs*, 15 N. Y. 575; *Morford v. Davis*, 28 id. 481, 485.) As every allegation of the answer simply contains a statement more or less in conflict with the complaint, and as the defendants do not even state that they deny such allegations as are not thereafter admitted or modified, they put nothing in issue. (*Thursby v. Crawford*, 33 Hun. 366; *McEncroe v. Decker*, 58 How. 250.) Where a material averment is susceptible of two meanings, the one most unfavorable to the pleader must be taken. (*Clark v. Dillon*, 97 N. Y. 373.) The simple allegation in the answers that the note was an accommodation note was not sufficient to show the paper invalid. (*Archer v. Shea*, 14 Hun, 493; *Hargar v. Warrall*, 69 N. Y. 370.)

George Yeoman for defendants. The trial court was right in not finding Charles Barton estopped from defending upon the ground of usury. (*Sherwood v. Hauser*, 94 N. Y. 626; *Baird v. Mayor, etc.*, 96 id. 576, 577.) Since it does not appear, except from the opinion, that the court reversed upon the facts, the question here is, was there any evidence sufficient in law to sustain the judgment. (*Kane v. Cortesy*, 100 N. Y. 132; *Sheldon v. Sheldon*, 51 id. 354; *Weger v. Beach*, 79 id. 409.)

ANDREWS, J. We think the answer sets out with sufficient distinctness and accuracy the transaction constituting the alleged usury as proved on the part of the defendants, and that there was no essential variance. It alleges in substance that Briggs & Co., the makers of the note to which the mortgage in question was collateral, applied to the plaintiff for a loan of \$5,000 for nine months, and that it was thereupon agreed between them that the plaintiff would loan to Briggs & Co., \$3,000 for the time stated, and transfer to them three notes he then held against third parties, amounting in the aggregate to \$1,500, upon receiving the note of Briggs & Co. for \$5,000, payable in nine months, with interest, and that

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the transaction was consummated as proposed between the plaintiff and Briggs & Co., and the note of \$5,000 given, indorsed by the defendant Barton and by John T. Briggs for the accommodation of the makers, and that the mortgage sought to be foreclosed was a further security to the plaintiff for the loan. The answer also alleges that the transaction was usurious and in violation of the statute. There is some lack of precision and certainty in the averments in the answer, but the plaintiff could not have been misled in respect to the defense intended, or as to the circumstances relied upon to support it. The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defense. (*Nat. Bk. of Auburn v. Lewis*, 75 N. Y. 516.) The claim that there was no sufficient denial in the answer of the averments in the complaint, if well founded, furnishes no ground of error. The defense of usury was not inconsistent with the admission of the averments in the complaint, and as the case turned wholly upon that defense, it is unimportant that the defendants may have admitted what but for the existence of the usury would have constituted a cause of action. On the merits the evidence was conflicting. The plaintiff was sworn as a witness in his own behalf. He admitted that he advanced only \$3,000 in money and \$1,500 in notes for the note of \$5,000 and the mortgage. It was not disputed on the trial that the note of \$5,000 had its inception on its transfer to the plaintiff, nor that the defendant Barton was an accommodation indorser for the makers. But the plaintiff testified in substance that he bought the \$5,000 note as business paper, believing at the time that it was such, and that he took it in reliance upon the credit of the parties to the paper and the mortgage of Barton, and also upon the certificate of the makers and indorsers of the note and the affidavit of Barton, the mortgagor, executed contemporaneously with the note, that it was business paper, and was given for a full consideration, and was subject to no defense of "want of consideration, usury or otherwise." On the other hand evidence was given on the part of the defendants, tending to

show that the plaintiff when he took the note and mortgage, had notice that the note was accommodation paper. Upon this ground the learned judge at Special Term held that the certificate and affidavit of Barton constituted no estoppel against his setting up the defense of usury against the mortgage. This was manifestly right upon the basis of the facts which the evidence of the defendants tended to establish. But the General Term, as appears from their opinion, reversed the judgment of the Special Term in favor of the defendant Barton, on the ground that the preponderance of evidence was in favor of the contention of the plaintiff that he took the note supposing it to be business paper, and without notice that Barton was an accommodation indorser, and that, therefore, Barton was estopped by his certificate and affidavit from defeating the mortgage on the ground of usury. But in the posture of the case on the appeal to this court, we cannot regard the reversal below as having been made on the facts, because this does not appear from the order of reversal, and we are bound to presume that the reversal was on questions of law only. On looking at the exceptions we find none upon which the order of reversal can stand. The question of pleading has already been considered. Exceptions were taken to findings of the trial judge that the transaction in its origin was a loan from the plaintiff to Briggs & Co., upon security of the note and mortgage, and that the plaintiff when he took the note and received the certificate and affidavit of Barton, knew his relation to the note, and did not rely upon the truth of the representations contained therein, and various exceptions were taken to the admission and rejection of evidence. There was evidence, we think, to support the findings excepted to, and we can find no exception to the admission or rejection of evidence which presents any material error. Dealing with the case, therefore, as we must, as one involving questions of law only, our conclusion is that the order of the General Term should be reversed, and the judgment of the Special Term affirmed.

All concur.

Order reversed and judgment affirmed.

Statement of case.

AUGUST NOEL et al., Appellants, v. FREDERICA M. KINNEY,
Impleaded, etc., Respondent.

Where a wife authorizes her husband to contract in matters relating to, and for the benefit of her separate estate, and in executing such a contract to use the name of a firm ostensibly composed of herself and her husband, she is liable upon an obligation so executed; and this, without regard to the question as to whether such a firm in fact exists, or as to whether as matter of law they were capable of assuming the relation of co-partners.

As to all contracts, relating to her separate estate or made in the course of her separate business, a married woman stands at law on the same footing as if unmarried, and can, therefore, make or authorize her husband as agent to make for her, negotiable paper which will be governed by the law merchant; and may be sued upon it in the ordinary way by general complaint without special averments.

A married woman may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*.

(Argued May 4, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 24, 1885, which denied a motion for a new trial and directed judgment for defendant Frederica M. Kinney.

The nature of the action and the material facts are stated in the opinion.

Nicholson P. O'Brien for appellants. The coverture of the defendant does not constitute a defense to a debt contracted in the trade or business in which she was engaged, building and improving her real and separate estate, in connection with which the goods were sold and delivered, and she is bound to the same extent as a *feme sole*. (*Frecking v. Rolland*, 53 N. Y. 422; *Owen v. Cawley*, 36 id. 600; *Bullin v. Dillaye*, 37 id. 35; *Manhattan Co. v. Thompson*, 58 id. 82.) She was the sole owner of the trade or business, and the property being improved was her separate estate; such a debt will be enforced against her to the same extent as if she were unmarried. (*Cashmar v. Henry*, 75 N. Y. 113; *Bitter v.*

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Ruthmar, 61 id. 512; *Tiemeyer v. Turnquist*, 85 id. 516; *Saratoga Co. B'k v. Pruyn*, 40 id. 254.) A married woman has the power to enter into a business partnership with her husband. (*Graff v. Kinney*, 15 Abb. 397.) The goods, which the note in question was made and delivered in payment for, being used in the trade or business in which defendant was engaged, viz., building on and improving her real and separate estate, and the transaction being in fact and substance exclusively on her credit and for her individual benefit, and notwithstanding the fact that the note is in the name of J. P. Kinney & Co., it was made and executed in her business and should be regarded as her note. (*Berkshire Woolen Co. v. Julliard*, 75 N. Y. 539; *Crary v. Goodman*, 12 id. 266-268, *Murtha v. Curley*, 90 id. 372.)

G. Storms Carpenter for respondent. The note in suit is void, so far as this defendant is concerned, for the reason that it contains no stipulation or consent that her separate estate shall be charged with the payment thereof. (*Corn Ex. Bk. v. Babcock*, 42 N. Y. 614.) And for the further reason that the goods in payment for which said note was given had been sold to the defendants (husband and wife) jointly, this defendant (the wife) was not liable for the purchase-price thereof, but the husband alone. (*Knapp v. Smith*, 27 N. Y. 277; *In re Boyle's Estate*, 1 Tucker, 4.) Husband and wife cannot transact business together as a firm or co-partners in trade. The statutes by which a married woman acquired the right to engage in trade or business at all only authorized her to carry on a business or trade in a certain manner, to wit., upon her sole and separate account, and only to contract, and incur obligations in respect to same. (*Coleman v. Burr*, 93 N. Y. 17, 23, 24, 25; Laws of 1860, chap. 90; Laws of 1862, chap. 172; *Bertles v. Nunan*, 92 N. Y. 152; *Kaufman v. Shoeffel*, S. C. Gen. T., 5th dept. 1885; 37 Hun, 140; *Yale v. Dederer*, 18 N. Y. 265; *Linderman v. Farquharson*, 101 id. 434; *Fairles v. Bloomingdale*, 14 Abb. [N. C.] 344; *Bodine v. Killeen*, 53 N. Y. 96; *In re*

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Boyles Estate, 1 Tucker, 4.) Prior to the acts of 1860 and 1862, a married woman could not carry on a business upon her sole and separate account so as to hold the earnings thereof protected from the claims of her husband's creditors, but such assets were assets of his estate. (*In re Boyle's Estate*, 1 Tucker, 4; *Goulding v. Davison*, 26 N. Y. 604; *Manchester v. Sahler*, 47 Barb. 155; *Robinson v. Rivers*, 9 Abb. [N. S.] 144; *Bodine v. Killeen*, 53 N. Y. 96; *White v. Waiger*, 25 id. 333; *Meeker v. Wright*, 46 id. 262-273; *Bertles v. Nunan*, 92 id. 152.)

DANFORTH, J. The action is upon a note signed "J. P. Kinney & Co." payable to the order of plaintiff at bank for \$505, value received. The complaint contains allegations usual in such cases, and sufficient to charge the defendants, as partners, under the name affixed to the note. Frederica M. Kinney alone answered, and her sole defense is, that at the time stated she was a married woman, and that the note was executed and delivered by her husband; there is, however, no allegation that it was made without her knowledge and consent, nor that it was made without her authority. Upon the trial the plaintiff put the note in evidence, and the defendant proved her marriage with the other defendant. There was evidence from which the jury might have found that she was the owner of improved real estate in the city of Brooklyn; that the consideration of the note was the purchase-price of mirrors placed in houses built upon her land and that the mirrors were unpaid for. The note was fairly taken and the consideration delivered upon the representation by the husband that the wife was the sole owner of the property and that the name of J. P. Kinney & Co. was used as mere matter of convenience in transacting her business. It does not appear that there was any business except in relation to the houses. No question was made as to the authority of defendant's husband to execute the note, nor as to the truth of his representations.

The defendant Frederica moved to dismiss the complaint upon the ground that, as to her, the note was invalid; "its

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form," as her counsel stated, "showing it was not given in respect to her separate business or estate." The trial judge directed a verdict for the plaintiff subject to the opinion of the court. It was so rendered, but on motion of the defendant's counsel, afterwards set aside by the same judge, and judgment ordered for the defendant. Exceptions taken by the plaintiffs to this ruling were directed to be heard in the first instance at General Term, judgment in the meantime to be suspended. The General Term overruled the exception and ordered judgment for the defendant.

It is obvious that the contract, in fulfillment of which the note was given, was of value to the defendant, for by it she acquired articles for the improvement of her property. She retains those articles and has so far avoided payment upon the ground that she and her husband, upon contracting and consummating marriage became one person, and so incapable of thenceforth contracting one with the other; that, therefore, they could not be partners, and, as the contract sued on was, in form, a co-partnership contract, it could not be enforced against her. If this is the present rule of law then the statutes which enable the woman to acquire and hold property, to bargain, sell, assign and transfer it, to carry on any trade or business and perform any labor or service on her own account, and which protect her in the enjoyment of her earnings from her trade, business, labor or services, and permit her to use and invest these earnings, are effectual only so far that she may alone or jointly with any person or persons, save her husband, derive profit and increase from her work and gain from the use of her estate. If they are to be so limited in her favor, they may easily, as in this instance, become not merely enabling statutes for her benefit, but also, in her hands, instrumentalities of fraud.

Upon the precise question presented, the opinion of the court below assumes that the decisions of other courts are conflicting, but we are referred to no case in this court where a woman has successfully asserted her coverture as a defense to an action for the price of goods purchased by her, and I

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am unable to see why, as against creditors, she should be permitted to interpose the mere form of her promise as an obstacle to their recovery. It is settled that the things, which the statutes above referred to permit her to do in person, she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as if unmarried; and it cannot be doubted that the improvement of her land or the management of her personal property, whether for preservation or business, may be conducted by her by means of any agency which any other owner of property might employ, and that the produce and increase thereof will be hers. (*Knapp v. Smith*, 27 N. Y. 277, 278; *Abbey v. Deyo*, 44 id. 343, 344.) So she may do those things through her husband as her agent. (*Abbey v. Deyo*, *supra*; *Rowe v. Smith*, 45 N. Y. 230.) She may also have such a community of interest with him in relation to real estate as will render her liable for his frauds relating to it, and when he, professing to act as her agent makes false representations, although without her knowledge and she receives the proceeds, she cannot retain the fruits of his fraud. (*Krumm v. Beach*, 96 N. Y. 398.)

Again as to all contracts relating to her separate estate, or made in the course of her separate business, she stands at law on the same footing as if unmarried, and can, therefore, make negotiable paper which will be governed by the law merchant, and can be sued upon in the ordinary way by general complaint, and without special statements. (*Frecking v. Rolland*, 53 N. Y. 422.) Nor can she escape liability because she and her husband are joint makers of the note sued on. In *Frecking v. Rolland* (*supra*) the action was on a joint promissory note signed by the defendants, who were husband and wife. He set up usury and she set up coverture. The court directed a verdict for the wife, and the jury gave a verdict against the husband. The creditor appealed. The General Term affirmed the verdict in favor of the wife, and the creditor appealed to this court. Against the appeal it was argued (1st) that being a married woman she was not liable for the note in suit;

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(2d) that the complaint being general and not specific, was insufficient to charge her property. Neither objection prevailed, and the judgment in her favor was reversed. There the husband, acting for himself and as the agent of his wife, borrowed money with which to pay for a factory bought by her. The money was loaned to them, and was in part so applied. The note was given for the money loaned and for services. The court, in answering the defendant's objections, show that the capacity of a married woman to make contracts relating to her separate business is incident to the power to conduct it, since the latter would be barren and useless if disconnected with the right to conduct it in the way and by the means usually employed. In the case cited she became a joint contractor with her husband, but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor; in this case both undertake to pay the creditor. Can it make a difference in the measure of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopted a name which represents a joint liability, which may in effect also be several? Partners are at once principals and agents — each represents the other — and if in the relation of partnership there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promissor to fulfill her promise.

More like the present case is that of *Scott v. Conway* (58 N. Y. 619), where, in an action for the price of labor and materials supplied to a theater carried on by Sarah G. Conway and her husband, Frederick B., under the name of "Mrs. F. B. Conway's Brooklyn Theater," and in which the wife and

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husband were jointly interested, it was held to be no defense against one who dealt with her in ignorance of the partnership that she had a dormant partner, and that the rule was not changed by the fact that the partner was her husband.

In *Bitter v. Rathman* (61 N. Y. 512) it was held that a married woman, who in secret trust for her husband becomes a member of a co-partnership, is to be regarded as the owner of the interest she represents, and might maintain an action for the dissolution of the co-partnership and for an accounting. The defendant in that case denied that she was a partner and asserted that he alone was interested in the business, claiming that being a married woman she could not in law be his partner. The court held otherwise, and also that, having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, although it might be otherwise in respect to her husband and his creditors. It would seem, therefore, that by becoming a partner either with a husband or another person a married woman loses no right of property. And no principle is suggested upon which her estate can be increased at the expense of creditors, nor how either in her own name or in her own name and that of another, or with another, she can purchase goods on credit to the advantage of her separate estate and not become liable for its payment. In *Coleman v. Burr* (93 N. Y. 17), cited by the appellant, the sole question was whether the conveyance of property by the husband to his wife was sustained by a consideration good as against his creditors, who impeached it. Here the wife was as capable of contracting as if she had been unmarried, as capable of adding to her estate by fresh acquisitions, and she should not be permitted to escape payment or performance by joining to her own name that of her husband, or by combining the two into a firm or partnership name. It was by that name she chose to contract, and as between herself and creditors she is bound by it. Individuals may be liable as partners to third persons, while as between themselves they are not. Here, then, the question is not between husband and wife. Assume that as to and with him she has no capacity. It by no means

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follows that she shall not be held upon a contract made by him upon a consideration moving to her, where a third person, who parted with that consideration in reliance upon the husband's apparent — and which turns out to have been a real agency, seeks to enforce the contract. If the adoption of a firm name was a mere contrivance to carry on the business jointly, and at the same time put the property acquired and added to the wife's separate property out of the reach of creditors dealing with either *bona fide* as the partner of the other, it should not be permitted to have that effect. If, as the testimony shows, the wife was the sole owner of the property, that the husband had no interest in it, out that for convenience they were doing her business in the name of J. P. Kinney & Co., her liability for a debt contracted in that name is entirely consistent with the fact, if it be a fact, that as between the parties themselves no partnership exists. This is so, although the plaintiff alleges in the complaint that the defendants are partners, and that allegation is not denied. For the purposes of the action it may be true. The plaintiff gave credit to them as such, but the goods he sold were intended by them to be annexed to the wife's separate estate and they were so annexed. If the arrangement was valid between all parties there is no pretense of a defense. If invalid only as between the defendants, the wife, who received the fruits of the transaction, cannot as against a creditor assert its invalidity. Although married she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*. (*Bodine v. Killeen*, 53 N. Y. 93) In this instance the plaintiff proved the contract, that it was made by her authorized agent and that it had reference to the improvement and benefit of her separate estate. She had capacity to do all these things, and if the arrangement which led to the use of her husband's name as joint promisor or partner, was beyond her power to enter into, she must meet that liability without regard to any question whether her husband is also liable, or as to what rights of indemnity or otherwise, she might have against him. She was a principal

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and he was her agent. He neither exceeded his power nor were his acts to her prejudice, and if by reason of any technical incapacity they could not contract with each other, or together as constituting that artificial entity, a firm or co-partnership (a question we do not decide), she is liable and the contract enforceable against her in favor of the plaintiff whose property has been added to her estate upon the strength of a promise made in her name by her authorized agent.

We think the court erred in directing judgment for the defendant. It should be reversed and the plaintiff have judgment upon the verdict.

All concur.

Judgment accordingly.

JOHN H. STARIN, Jr., Appellant, v. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Where an attorney is employed, without agreement as to compensation, to bring a great number of actions, alike in their nature, involving no complicated questions of law and only the most simple questions of fact; which actions are disposed of by obtaining judgments by default or otherwise without contest, there is no rule of law which makes, as against his client, the taxable costs the measure of compensation to which he is entitled for his services. He is simply entitled to what it can be shown the services are reasonably worth under the circumstances. *It seems* that since the passage of the Code, there is no rule of law which in any case makes the compensation of the attorney necessarily co-extensive with the taxable costs, in the absence of an agreement.

Scott v. Elmendorf (12 Johns. 315); *Brady v. Mayor, etc.* (1 Sand. Sup. Ct. Rep., 569); *Rooney v. S. A. R. R. Co.* (18 N. Y. 368), distinguished.

(Argued May 5, 1887 ; decided June 7, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 10, 1882, which reversed a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

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A. J. Vanderpoel for appellant. On the employment of an attorney in a suit the law presumes a promise to pay him a compensation for his services measured by the statutory costs as taxable between party and party, and if the employer relies upon an agreement for a lower rate, the burden is made to show such agreement. (*Brady v. Mayor, etc.*, 1 Sanf. Super. 569, 592; *Richardson v. Brooklyn City R. R. Co.*, 15 Abb. 342; *Scott v. Elmendorf*, 12 Johns. 315).

David J. Dean for respondent.

PECKHAM, J. The plaintiff sues as assignee of one who was appointed by the excise commissioners of New York their attorney to prosecute actions for violations of the excise laws in their county.

He was appointed such attorney in 1858, but only actively commenced his work in 1859, and from then until 1863 his whole time, he says, was taken up in this business, but more actively at the commencement of the season when the board would meet. From 1863, his services were so slight that he did not keep a book and it was not worth making even a memorandum of the amount of costs collected by him. His active work was thus shown to have been included within about the period of four years. The amount of the work done may be thus summarized: He commenced 14,915 actions for violations of the law by selling liquor without a license. The names of the defendants were reported to him from the commissioners of excise, with the dates of the alleged violations, and he then filled in such names and dates in blank summons and complaints which required only such names and dates to make a perfect writ and pleading. Five minutes spent in this business was ample to fill out each case and indorse it, etc. In 8,656 of such actions the defendants appeared, a majority by one attorney, and put in answers which were simply general denials. In 1,054 of these actions judgments were taken by default on application to the court and executions issued thereon. In 1,243 of the actions notices of trial were given and they were placed on the calendar and remained thereon

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twelve terms, although after the trial of four or five the judges refused to try any more, and none were tried, and the evidence shows pretty conclusively that they were not necessarily on the calendar nor did they require any attention, owing to an understanding that they were not to be moved until a test case had been decided by the Court of Appeals, and they never were moved.

The county paid the disbursements for printing, for county clerk's and for sheriffs' fees. The whole sum disbursed by the attorney for clerk hire and every other expense amounted to between \$3,000 and \$4,000. There was no agreement between the attorney and the board as to compensation. He collected and appropriated to his own use, of costs and penalties in these actions, the sum of \$10,000.

This is the character of the services performed by the attorney, and their amount has been thus substantially detailed, and upon this branch there was no contradictory evidence.

The plaintiff to prove their value called six witnesses, one of whom had been one of the commissioners of excise during the time inquired about, and they said that in their opinion, in the absence of any agreement, the attorney was entitled to be compensated at the rate of the statutory costs, and that the number of the cases would not alter their view of the matter in the least; that if it was worth that sum for one case it was for 14,000. One witness seemed to regard the matter much in the same light as if the attorney had discovered a gold mine, and was entitled to the rewards of his good fortune. He thought that if 200 suits were commenced in one day (in the manner above described by the mere filling in of a name and a date in blanks left for that purpose), it was worth \$10 in each suit, and therefore, \$2,000 a day for that service would be a fair and reasonable charge against the county. He said he looked at the whole thing; "it would only occur once in his life probably." At the same time he said, that an attorney capable of doing this business, could probably have been hired by the year for from \$1,500 to \$2,000. This he subsequently explained by saying he meant

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one could be hired for that sum, who superadded to his clerical ability a sufficient quantity of character to entrust him with the charge of the papers in the office — not performing the “brain work,” but the mere manufacture of the paper after he had been advised by the counsel in the case. The compensation which this witness would award, including \$2,000 per day for the commencement of 200 suits, and \$12,000 a month for term fees, for cases on the calendar which required no attention, and other things in like proportion, the witness said he regarded as compensation for the attorney, for “him for the moments of leisure in his life spent in the acquiring of sufficient knowledge to carry on and conduct a prosecution successfully through.” Another witness who estimated the same amount of \$10 for a term fee in each case, which would amount to \$12,000 a month, said such amount was in his opinion fair and just even when nothing was done in the causes, they being simply on the calendar and requiring no watching, so long as he had cases enough to make up such total at the specified sum for each. He said in regard to all the services for which he gave an opinion as to their value, that he did not regard them “as services which involve the question of ability or professional skill,” and that was the reason he gave the answer he did, which was that services of a skilled nature should be compensated more liberally in the case of an experienced lawyer than another, but that for such services, as this attorney performed, he would make no difference in the compensation so far as regarded any reputable member of the bar. The matter is alluded to only to show what is indeed otherwise perfectly plain, that even in the opinion of at least one of plaintiff's witnesses the services of the attorney were not of a high grade, certainly, of skilled labor.

The rest of the evidence for the plaintiff is of a like nature, and based upon the same principles and reasoning viz.: that however large might be the difference between the taxable costs in all these cases and the amount for which such services could have been obtained, by making an agree-

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ment with a perfectly reputable and competent attorney in regard to it before hand, yet if that precaution happened to have been neglected such fact was entirely unimportant in forming an opinion as to the value of those services. It is to be gathered that this surprising fact was based upon the belief of the plaintiff's witnesses that, in the absence of an agreement, the attorney was entitled to be compensated for his services in any and in all cases, no matter how great their number, at the rate of the taxable costs in each case.

The defendants called thirteen witnesses, many of them among the leading members of the bar in New York city, and they one and all declared that while in the ordinary run of suits of a not very intricate nature the compensation of an attorney might be reasonably based upon the taxable costs in a case; yet in their judgment where the cases were of the simplest possible nature, and were of such an enormous number, and the labor involved was so largely reduced to that of mere machinery, as in the cases under discussion, the compensation under such circumstances at the rate of taxable costs was enormously extravagant, and each one gave his opinion as to the value of such services, taking it as an employment by the year (as the attorney was appointed annually), and also judging of such value by considering it with reference to each suit.

The difference between the highest amount, as given by the defendants' witnesses, and the lowest, as measured by the plaintiff's witnesses, amounted to the difference between about forty or forty-five thousand and three hundred and thirteen thousand five hundred and seventy dollars. The referee signed a report for the sum last named, with interest, amounting in all (after deducting what the attorney had received) to the sum of \$388,156.41, for which sum, with costs, judgment was entered. The defendants appealed, and the General Term of the Supreme Court reversed the judgment, as well upon the facts as the law, and so stated in its order of reversal. The plaintiff then appealed to this court from the order granting a new trial, and gave the usual stipulation.

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The order of the General Term, reversing the judgment entered upon the report of the referee and granting a new trial, should be affirmed. The most limited construction of our power in reviewing questions of fact, arising as they do in this case by a reversal in the General Term of the findings of fact by a referee, is broad enough to permit and to compel an affirmance of the General Term order. The result arrived at by the referee ought to shock the common sense of every intelligent man. The idea that a lawyer of respectable character could by any possibility earn over \$300,000 in the space of four or five years by services of a legal nature requiring no more legal ability than was involved in making out a summons and complaint and taking judgments by default in these excise cases, is a delusion simply, and any judicial tribunal that should determine it to be a fact would be absurdly at war with the truth and the common and universal experience of mankind.

As I have said, the testimony of plaintiff's witnesses seems to have been based upon the assumed law that if no bargain were made, the attorney was entitled to the taxable costs in every case.

As a mere measure of compensation for services as an attorney, performed in an ordinary case or in a very small number of such cases, that rule may be very well and may furnish, under such circumstances, a fair rate of compensation. But upon a question of compensation for services performed in an enormous number of cases involving no complicated questions of law, and only the most simple of all questions of fact, taxable costs granted in each case as a measure of compensation would make it most grossly excessive. I do not think there is, in truth, any general rule of law that, since the Code, makes the compensation of the attorney necessarily co-extensive with the taxable costs in the absence of an agreement. The counsel for the plaintiff cites, to prove that there is such a rule, certain cases, and among them *Scott v. Elmendorf* (12 Johns. 315), and *Brady*

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v. *Mayor, etc.* (1 Sand. Sup. Ct. 569), and some cases in the Supreme Court since the Code.

The cases just above cited arose under the old fee bill, and do not touch the question under the Code. In *Rooney v. Railroad* (18 N. Y. 368) which was only a question as to an attorney's lien on a judgment under the Code, HARRIS, J. said as a mere expression of an opinion on a subject not decided by the court, that "in the absence of any agreement on the subject I suppose the sum recovered by the party as an indemnity for his expenses would be the measure of compensation allowed to the attorney." COMSTOCK, J., in the same case said: "It is not important now to determine what may be the implied agreement of the client with his attorney." That case is no authority for plaintiff's contention. There are some cases in the Supreme Court which say that *prima facie* the implied agreement is to pay at the rate specified by the statute. I assume this statement to mean that it is in the absence of every other fact which courts might think material in judging what the implied agreement was, and as thus construed no fault need be found with it as furnishing under such circumstances *prima facie* evidence of what is the reasonable value of the services. But this court has said what the implication is in case no special agreement was made. In *People v. Supervisors of Del. Co* (45 N. Y. 196, at p. 202), FOLGER, J. said: "By the Code (§ 303), the measure of such compensation is left to the agreement, express or implied, of the parties. There was no express agreement between the relator and the board of commissioners of excise what should be his compensation if it became a charge against the county. He should be paid then what his services were reasonably worth. Not according to what they produced to his client, but what such services in themselves considered were reasonably worth, looking at the labor, time, talent and skill expended in the bestowal of them." In *Van Every v. Adams* (42 Super. Ct. 126) the same rule is laid down, that the attorney in the absence of an agreement is entitled to recover what his services were reasonably worth. If this explanation of the

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basis for the opinion of the plaintiff's witnesses be not accepted, and their testimony is to be construed as holding that the number, simplicity and perfect similarity of cases put in an attorney's hands by his client should have no weight in determining the principles upon which compensation is to be made, or its amount in each case, then such evidence disregards the general experience of men, which teaches all of us that in all dealings between man and man, whether of a mercantile or a professional nature, the mere fact of a large number of precisely similar things sold or services rendered, is one of the most important factors in its bearing both upon the price of the commodities sold and the amount of compensation for professional services. A lawyer who does all the business of a solvent client where the business amounts to a great deal, will of course take such fact into account in making up his charges, and to a still greater extent where the services were all of a similar nature and almost clerical in their character. Every lawyer knows this and has a right to remember it whether acting as a judge or referee. Looking at it in this light, the evidence for the plaintiff appears to have been given under a misapprehension of the law or else in defiance of facts which are known to every intelligent man, lawyer, judge or layman. Under such circumstances the evidence on the part of the plaintiff as to value appears to be worthless, and to be wholly overwhelmed by the evidence given on the part of the defendants.

The learned referee says that all the witnesses agree that in the absence of an agreement the reasonable and usual charge is, at least, the taxable costs. I have looked through the evidence very carefully and am unable to concur in that view. On the contrary there is a singular unanimity of dissent on the part of all the witnesses for defendants as to the existence of any such rule under the circumstances herein detailed. If the referee were at first inclined to believe that there was any such rule applicable to a case like this, when he saw the enormous proportions which the compensation based thereon would assume, he might well have paused and made

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a most thorough review of his opinion as to the existence of any rule which in the application to the case before him would lead to so unprecedented an award.

In our judgment, based upon the whole case, the evidence was overwhelming in its nature and degree in favor of the contention of the defendants as to the value of the services performed by the plaintiff's assignor.

The order of the General Term, reversing the judgment in favor of plaintiff and granting a new trial, should therefore be affirmed with costs, and judgment absolute awarded against him upon his stipulation.

All concur.

Order affirmed and judgment accordingly.

MATTHEW F. NORTON, Respondent, v. BERNARD DREYFUSS, Appellant.

106	90
115	335
106	90
140	208

In an action to recover the purchase-price of goods manufactured for and delivered to defendant, the defense was that the goods were not such as the contract called for. The evidence on trial was conflicting as to the terms of the contract, the quality of the goods and their fitness for the use intended, and as to whether they corresponded with those ordered. It appeared that plaintiff manufactured and delivered goods in quantity corresponding with the order; that, some faults in their quality having been alleged, he received them back and attempted to remedy the alleged defects and finally redelivered the whole quantity to defendant, that defendant still claimed that they did not correspond with the articles plaintiff contracted to make, and when the latter demanded payment refused, and that thereupon plaintiff demanded a return of the goods, to which defendant replied that he would not give them up, as he wished to consult counsel as to his right to keep them for reimbursement of damages. The trial court thereupon ordered judgment for plaintiff, holding that the refusal to return the goods amounted to an acceptance under the contract. *Held*, error; that the question was one of fact for the jury.

The acceptance by a vendee of articles manufactured for him under an executory contract, after an opportunity to examine, precludes him from raising any objection as to defects which were visible and capable of discovery on inspection, unless there was a warranty of quality which was intended to survive acceptance.

Statement of case.

Where there is such a warranty the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the contract as a defense to an action for their price.

It seems, however, the purchaser may not in the same action sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty.

Norton v. Dreyfuss (19 J. & S. 491) reversed.

(Argued May 5, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 30, 1885, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court and affirming an order denying a motion for a new trial. (Reported below 19 J. & S. 491.)

The nature of the action and the material facts are stated in the opinion.

John Frankenheimer for appellant. It was a question for the jury whether, under all the circumstances of the case, the buyer's conduct was to be interpreted as a ratification of the bargain. (Story on Sales [4th ed.], § 405; 2 Smith L. C. [7th Am. ed.], 36, star paging 33, note to *Cutter v. Powell*.) In an executory contract for the manufacture of goods with express warranty, the vendee is not bound to return the goods on discovery of a breach of the warranty, but may retain and use the articles, and rely on the warranty. (*Brigg v. Hilton*, 99 N. Y. 517; *Bach v. Levy*, 101 id. 511; *Kent v. Friedman*, id. 616; *Connor v. Dempsey*, 49 id. 665; *Whitehead Man'fg. Co. v. Ryder*, 139 Mass. 366; *Richardson v. Grandy*, 49 Vt. 22, 25; *Murray v. Smith*, 4 Daly, 277.) As no special form of words is necessary to create a warranty, it was at least a question of fact for the jury, whether what passed between the parties amounted to one. (*Duffie v. Mason*, 8 Cow. 26; *Murray v. Smith*, 4 Daly, 277; *Whitney v. Sutton*, 10 Wend. 413; 2 Benj. on Sales [Corbin's ed.], 811, 813, § 932, note 7.) In case of breach of express warranty the buyer may wait until he is sued for the purchase-money, and then take advantage of the breach; not as a technical set-off, but as proof

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of failure of consideration and in mitigation of damages. (1 Smith L. C. [7th Am. ed.], 275 star paging; *McAllister v. Real*, 4 Wend. 489; *S. C.*, 8 id. 109; *Judd v. Dennison*, 10 id. 513; *Mondel v. Steele*, 8 M. & W. 858.) The mere refusal to surrender the dies on demand until defendant could obtain the advice of his counsel, was not, as matter of law, an acceptance of the dies as satisfactory, in the face of defendant's absolute rejection of the same as unsatisfactory and wholly worthless. (*Duplex S. B. Co. v. Gardner*, 101 N. Y. 387; *Gray v. Cent. R. R. Co.*, 11 Hun, 70; *Tyler v. Ames*, 6 Lans. 280; *Spring v. Am. Clock Co.*, 24 Hun, 175, 176; *Grant v. Burch*, 26 id. 376; *Brown v. Foster*, 113 Mass. 136.) The plaintiff, by demanding a return of the goods himself, rescinded the sale. (*Thornton v. Wynn*, 12 Wheat. 193; *Long v. Preston*, 2 M. & P. 262; *Healey v. Utley*, 1 Cow. 345; 2 Pars. on Cont. 677, 678; *Fullager v. Reville*, 3 Hun, 600; *Morris v. Rexford*, 18 N. Y. 552; *Kinney v. Kirnan*, 49 id. 164; *Mondel v. Steele*, 8 M. & W. 858, 871; *Baston v. Butler*, 7 East 479; Story on Sales [4th ed.], § 408; 2 Schouler Pers. Prop. 61; *Bliss v. Locke*, 9 Daly, 526.)

Edward S. Hatch for respondent. The defendant's only relief in this case was by a counter-claim for damages because of a breach of warranty, expressed or implied (*Day v. Poole*, 52 N. Y. 416; *McCormick v. P. C. R. R. Co.*, 99 id. 65; *Boyce v. Brockway*, 31 id. 490.) The defendant was only entitled to nominal damages because of any breach of warranty on the part of the plaintiff. (*Hughes v. Ferguson*, 23 W. Dig. 185; *J. J. Case. T. Mach. Co. v. Haven*, 31 A. L. J. 417; *Brigg v. Hilton*, 99 N. Y. 517.) There was no issue of fact alleged in the complaint for the trial judge to leave to the jury. (*Beck v. Sheldon*, 48 N. Y. 365; *Griffin v. Colver*, 16 id. 489; *Cassidy v. Le Fevre*, 45 id. 562.) The complaint in this case contained a cause of action sufficient to base the verdict directed by the trial judge. (*Dounce v. Dow*, 64 N. Y. 141; *Higgins v. Newton*, 66 id. 604; *Du Bois v. D. & H. C. Co.*, 4 Wend. 285; *Woodward v. Fuller*, 80 N. Y. 312.)

Opinion *per Curiam*.

Per Curiam. The plaintiff brings this action to recover the contract price for manufacturing and delivering certain dies and frames for the defendant. The answer was that the goods were not such as the contract required, and also set up a counter-claim.

The evidence given upon the trial differed very much as to the terms and conditions of the contract, the time for its performance, the quality of the articles manufactured, their fitness for the purposes intended, and as to whether the goods delivered, corresponded with the articles ordered by the defendant. It was conceded that the plaintiff manufactured and delivered goods, in quantity and number corresponding with those required by his contract, and that some faults in their character and quality, were alleged by the defendant to exist, when tendered in performance of the contract. It was also proved that the plaintiff received the articles back on several occasions, and attempted to remedy the alleged defects, and finally redelivered the whole quantity to the defendant. It was then still alleged by the defendant that they did not correspond with the articles which the plaintiff contracted to make for him. Three or four days after this time the plaintiff called upon the defendant for the payment of the amount claimed by him to be due upon the contract, which was refused by the defendant. The plaintiff thereupon demanded the return of the goods, and the defendant replied in substance that he would not then give them up as he wished to consult counsel as to his right to keep them, for reimbursement of the damages which he alleged he had sustained, by reason of the plaintiff's failure to perform his contract.

The evidence as to what was said by the defendant at the time of the demand was somewhat contradictory, but we believe the above statement expresses the meaning substantially of the defendant's version of the transaction. The defendant gave no evidence as to the damages claimed to have been sustained by him on account of the alleged breach of contract.

Upon this case, aside from some immaterial circumstances,

Opinion *per Curiam*.

which do not affect the question of law presented, the trial court ordered judgment for the plaintiff for the amount of his claim, holding that the refusal of the defendant to return the goods, when requested, amounted to an acceptance of them upon the contract. The defendant excepted to this direction. He also requested to be allowed to go to the jury on "the question of fact involved in the case, upon the whole evidence, whether the defendant did accept the frame dies or the medallions as in compliance with the order as given by him," and also upon the further question "whether the defendant did absolutely refuse to return the frame dies or the medallions, or whether it was a qualified refusal." Both of the requests were denied by the court and the defendant excepted.

We are inclined to think the trial court erred in these decisions, and that the case should have been left to the jury to determine as a question of fact upon the requests made by the defendant. It is now quite well settled that the acceptance by the vendee of articles manufactured for him, under an executory contract, after an opportunity to examine them, precludes him from raising any question as to defects or imperfections which were visible and capable of discovery on inspection, unless there is a warranty of their quality which was intended to survive their acceptance, and give the vendee further time for trial and examination. When there is such a warranty the vendee may still retain the goods, and when action is brought for their price, recoup such damages as he can show he has suffered by reason of the defective or inferior character of the goods delivered. He may also, in such an action, recover damages for a breach of contract on the part of the vendor in respect to the time of its performance, if he can prove that he has suffered loss therefrom.

But these propositions do not seem to us to dispose of the case. When one party has the property of another in his possession, and refuses to surrender it upon demand, a jury is authorized to infer from these facts a conversion of the property; but such evidence raises a question of fact alone, and cannot be determined as a question of law. We think

Opinion *per Curiam*.

this case is analogous to the question arising in an action of trover. Here two courses were open to the defendant to adopt in case he was dissatisfied with the performance of the contract by the plaintiff, and was satisfied that he had a warranty of the goods, which would survive their acceptance. He could return the goods, and plead the rescission of the contract as a defense to the action for their price, or he could keep the property, relying upon his warranty to recover such damages as he could show he had suffered by its breach as a counter-claim to the plaintiff's action for their price.

These defenses are, however, inconsistent with each other and cannot both be sustained in the same action. In case of a return of the goods and proof of their defective character, or a valid offer to rescind the contract, he makes out a defense to the claim to recover their price. If he retains the goods, however, and attempts to recoup his damages for a breach of warranty, he may, provided he claims an affirmative judgment in his answer, not only defeat any recovery, but recover judgment for the entire amount of damages shown by his proofs, although it exceeds the plaintiff's claim.

It is quite uncertain on the pleadings and evidence in the case what line the defendant really attempted to adopt, for the evidence was about as applicable to one theory as the other. While he admitted that he had declined to give up the goods, he strenuously insisted that he had always refused to accept them, and while denying that he ever became liable for their price, he claims that he was entitled to damages for the plaintiff's non-performance of his contract. Under these circumstances, we think it was a question for the jury to determine whether the defendant's refusal to give up the goods was an election to accept them or simply a tentative proceeding to give him further time for examination and trial, or whether it was the expression of a determination to keep them and rely upon the damages which he might be able to prove, arising from the alleged breach of warranty as to their quality, and the non-performance of the contract in other respects by the plaintiff.

Opinion *per Curiam*

By the direction of a verdict the defendant was deprived of the right, of going to the jury on the question of the worthlessness of the goods as a performance of the contract. The evidence upon this question was quite contradictory and the jury might well have found either way upon the question. If they had found that the goods were utterly valueless to the defendant he would then have made out a defense and was entitled to a verdict at their hands. If they had found, however, that the refusal of the defendant to redeliver them was intended as an acceptance, or that the goods delivered were substantially the same as those ordered and his refusal to return was dictated by an intention to evade the payment of the contract-price after discovery, that they were not adapted to his purpose, the jury would have been justified in giving a verdict for the price. But the question as to whether such a demand and refusal, under all the circumstances of the case, was the equivalent of an acceptance of the goods under the contract, was a question for the jury to determine and could not be decided as a question of law.

We are, therefore, of the opinion that the judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur, except RUGER, Ch. J., and EARL, J., not voting.

Judgments reversed, and a new trial ordered, costs to abide the event.

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CHRISTIAN E. CHRISTENSEN, Respondent, v. AMOS F. ENO,
Impleaded, etc., Appellant.

106	97
110	661

The unissued shares of stock of a corporation are not assets in its hands, and in the absence of any statutory provision, or provision of its charter, one to whom shares have been transferred by it gratuitously, does not, by accepting them, become a debtor to the company or make himself liable to pay the nominal face of the shares as upon a subscription for the stock or a contract, and an action is not maintainable against him by a creditor of the corporation to compel him to pay for such shares. So, also, where bonds of a corporation have been issued by it gratuitously to a stockholder, but no portion of its property or assets has been applied in payment thereof, the stockholder is not liable to account to creditors for the proceeds of the sale of said bonds by him. A remedy given by the statutes of another State to creditors of a corporation against its stockholders is not available here.

(Argued May 6, 1887; decided June 7, 1887.)

APPEAL by defendant Eno from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 21, 1885, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as judgment-creditor of defendant, the Illinois and St. Louis Bridge Company, against it and defendant Eno, among other things, to compel the latter to pay forty per cent of the par of twenty-five shares of the stock of said company issued by it to him, upon which stock the forty per cent was not paid, but was credited as paid when the stock was issued; also, to compel said defendant to account for and pay over, in satisfaction of plaintiff's judgment, the proceeds of the sale by him of certain second mortgage bonds gratuitously issued to said Eno as a stockholder by said corporation, upon payment by him of the remaining sixty per cent of said stock.

William Man for appellant. The plaintiff cannot maintain an action against a single stockholder to recover on account

Statement of case.

of the stock. (*Griffith v. Mangam*, 73 N. Y. 611; 2 R. S. [7th ed.] 1531, § 5; *Scoville v. Thayer*, 105 U. S. 143, 153, 156; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 id. 9; *Hatch v. Dana*, 101 U. S. 205.) Stockholders can be held liable for unpaid stock only in an action brought in behalf of all creditors, to which all delinquent shareholders should be parties. (*Mann v. Pentz*, 3 N. Y. 415; *Griffith v. Mangam*, 73 id. 611; *Seymour v. Sturgess*, 26 id. 143; *Gibson v. Lewis*, 11 N. B. Reg. 247; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Little*, 101 U. S. 216, *Patterson v. Lynde*, 106 id. 519; *Niver v. Crane*, 98 N. Y. 40; *Lowry v. Inman*, 46 id. 119; *Wood v. Dummer*, 3 Mass. 308.) Evidences of debt cannot be assets of property. (*Lumber v. Leroy*, 2 Sand. Super. Ct. 202; *Coddington v. Gilbert*, 17 N. Y. 489)

C. E. Tracy for respondent. The action was properly brought by one creditor on his own behalf and for his own benefit. There is no rule of law which limits the remedy of a creditor in such a case to what are called sequestration proceedings or a suit against all the stockholders as claimed by defendant. (*Barclay v. Tallman*, 4 Edw. Ch. 128; *Edmeston v. Lyde*, 1 Paige, 636; *Garrison v. Howe*, 17 N. Y. 458, 462, 463; *Hastings v. Drew*, 76 id. 9, 16; *Wheeler v. Miller*, 90 id. 353, 361; *Hatch v. Dana*, 101 U. S. 205; *Scoville v. Thayer*, 105 id. 143.) The judgment-roll evidencing the recovery of the plaintiff's judgment against the corporation was not, nor was the proof of the return unsatisfied of the execution thereon, incompetent evidence as against the defendant Eno. (*Hastings v. Drew*, *supra*; *Stephens v. Fox*, 83 N. Y. 313.) The objection made by defendant that the stock and bonds so received by him were not assets of the corporation, is untenable. (*Railroad Co. v. Howard*, 7 Wall. 392, 409, 416; *Sawyer v. Hoag*, 17 id. 610, 620; *Upton v. Tribelcock*, 1 Otto, 45, 47; *Scammon v. Kimball*, 2 id. 362, 367; *Scoville v. Thayer*, 105 U. S. 143, 152, 153; *Bartlett v. Drew*, 57 N. Y. 597, 589; *Hastings v. Drew*, 76 id. 9, 16.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The judgment below proceeds on the ground that the forty per cent credited as paid on the twenty-five shares of stock of the Illinois and St. Louis Bridge Company, issued to the defendant Eno in 1871, but which was not in fact paid, and also the sum of \$5,332.18, realized by him on the sale of second mortgage bonds of the company, received as his share on the distribution of the same among stockholders, pursuant to the resolution of the company of December 20, 1871, were equitable assets in the hands of the defendant Eno, applicable to the payment of the debts of the corporation, and which the plaintiff, as a judgment and execution creditor, may reach in this action and have applied to the satisfaction of his judgment. It is very plain, upon the facts, that the plaintiff in asserting this claim cannot stand upon any right existing in the corporation itself to proceed against the defendant Eno. The transactions by which he acquired the shares as paid up shares to the extent of forty per cent of their nominal amount, and received the bonds, created no obligation as between him and the company to pay the amount unpaid on the stock or to account to the company for the bonds or their proceeds. As between Eno and the company it was not intended that the former should be accountable to the company for the amount unpaid on the stock or for the bonds. Viewing the transactions in the light most favorable to the plaintiff, the credit on the stock and the transfer of the bonds were intended as a gratuity to the stockholders who had been called upon to pay calls upon their original subscriptions in excess of what was expected and of what was represented would be necessary at the commencement of the enterprise. There can be no doubt that as between the corporation and its stockholders these transactions were binding according to the actual intention. The corporation itself would have no standing to demand that the defendant Eno should pay the forty per cent on the stock which it acknowledged had been paid, or that he should account for the proceeds of the bonds. The claim of the plaintiff, therefore, must be maintained, if at all, not in right of the corporation, or by way of equitable

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subrogation to any right of the corporation against Eno, but in hostility to the arrangement between them, under which he received the stock and bonds. The plaintiff, to entitle himself to the relief demanded, is compelled to maintain that, as a creditor of the corporation, he has rights superior to those of the corporation itself and may hold the defendant to account for the unpaid forty per cent on the stock as though he had been a subscriber therefor, and for the proceeds of the bonds as though he had purchased them of the corporation, or had sold them on its account. So far as respects the claim to recover the forty per cent unpaid on the twenty-five shares of stock, we understand it is placed, by the learned counsel for the plaintiff, mainly on the proposition that the capital stock of a corporation is a trust fund for the security of creditors, which cannot be given away or distributed among stockholders so long as debts of the corporation remain unpaid, and that the transaction in question was a violation of this principle. The general principle asserted is, doubtless, well founded, but if it had an appropriate application in the present case, the plaintiff would encounter some difficulty under the authorities in this State, in maintaining a separate action as an individual creditor of the corporation, to reach assets which constitute a trust fund, not for the protection of one creditor only, but equally for all the creditors of the corporation. (*Griffith v. Mangam*, 73 N. Y. 611, and cases cited.) But passing this, we are of opinion that the forty per cent credited on the twenty-five shares of stock issued to the defendant Eno, cannot be considered as, and does not constitute a trust fund applicable to the payment of creditors. The capital of a corporation consists of its funds, securities, credits and property of whatever kind which it possesses. The word "capital" applied to corporations is often used interchangeably with the words "capital stock," and both are frequently used to express the same thing—the property and assets of the corporation. Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers

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to the stock on the initiation of the corporate enterprise. (See *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211, 212, and cases cited.) It may be admitted that the liability of subscribers on unpaid stock subscriptions constitute an asset of the corporation, which cannot be surrendered or given up by the corporation without consideration to the prejudice of creditors. It is not claimed that there is any express prohibition in the charter of the bridge company against issuing shares purporting to be fully paid without actual payment. The charter authorizes books of subscription to the stock to be opened. The most that could be claimed from this provision is that by implication it prohibits the issue of stock except to actual subscribers who should undertake to pay the nominal amount of the shares when required. There is no pretense that the defendant Eno ever subscribed for the twenty-five shares of *bonus* stock (so called), or entered into any engagement to pay the forty per cent credited thereon. This was distinctly contrary to the intention of all parties. The plaintiff seeks to charge him as though he had subscribed for the stock and entered into a contract obligation with the company to pay the forty per cent. We can see no ground upon which he can be made to respond to the creditors of the company as upon an unpaid subscription. Assuming that the transaction as to the company was *ultra vires*, or that it could not give away its shares, the transaction in that view was simply a nullity, and Eno got nothing as against any one entitled to question the transaction. But it did not convert him into a debtor of the company for the forty per cent. He entered into no contract to pay it. He has received nothing on account of the twenty-five shares, and it is not claimed that the charter in terms imposes the liability claimed. The unissued shares of a corporation are not assets. When issued they represent a proportionate interest in the shareholder in the corporate property—an interest, however, subordinate to the claims of creditors. There are unquestioned public evils growing out of the creation and multiplication of shares of stock in corporations

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not based upon corporate property. The remedy is with the legislature. But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract. (*Seymour v. Sturgess*, 26 N. Y. 134; *In re Western Canada Oil Co.*, L. R., 1 Ch. Div. 115; *Waterhouse v. Jamieson*, 2 L. R., H. L. [Sc.], 29.) The question as to the right of the plaintiff to compel the defendant to account for the sum realized by him on the sale of the bonds, is affected by the fatal difficulty that the defendant has received nothing from the corporation except its promise to pay, which has never been performed. The plaintiff has withdrawn nothing from the funds of the company on account of the bonds (unless it may be a sum represented by a single interest coupon) and creditors have not been prejudiced by the transaction. It is alleged, and it was offered to be proved, that the property of the company had been sold on the foreclosure of the first mortgage. It is unnecessary to consider what the rights or liabilities of the defendant would be in respect to the bonds as between himself and other creditors of the corporation on a distribution of assets, or if it had appeared that the corporation had paid the bonds issued to the defendant. The situation in either of these aspects is not presented. This is not a case of following assets of a corporation wrongfully transferred. The defendant has received none of the funds or assets of the company available to creditors. The loss on the bonds falls on those who have purchased them relying on the credit of the corporation. The situation of the general creditors has not, so far as appears, been affected by the fact that the company received nothing for the bonds. The statute of Missouri, the State from which the bridge company in part derives its existence, authorizes a creditor of a corporation, who shall have obtained judgment against it,

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upon which an execution has been returned *nulla bona*, to issue execution thereon against any stockholder to an extent equal in amount to the amount of stock held by him "together with any amount unpaid thereon." The courts of Missouri on an application under this statute for leave to issue execution against a person who was a director and stockholder in the bridge company, who had received bonus stock and bonds, granted the application and came to the conclusion that the forty per cent credited on the stock could be regarded as the amount unpaid thereon within the statute, and that the amount received on the bonds was also recoverable. (*Skrainka v. Allen*, 7 Mo. Rep. 434, 435; *S. C.*, 76 id. 384.) The statutory remedy is, of course, not available in this State. (*Lowry v. Luman*, 46 N. Y. 119, 120.) The court seems to have given much weight to the fiduciary and trust relation existing between a director of a corporation and its creditors. That relation did not exist between the defendant Eno and the creditors of the company. He was a stockholder simply, and no trust relation exists between a stockholder in a corporation and its creditors. The decision in Missouri may stand on its special circumstances, but it is not controlling in the case before us.

We are of opinion that the judgment appealed from is erroneous and that it should, therefore, be reversed and a new trial ordered.

All concur.

Judgment reversed.

Statement of case.

In the Matter of the Petition of LEWIS H. CLARK, a taxpayer, etc., Appellant, v. ANDREW J. SHELDON, County Treasurer, etc., Respondent.

The provisions of the railroad act of 1869 (§ 4, chap. 907 Laws of 1869), directing and providing for the application of taxes assessed upon any railroad in a town, city or village; toward the redemption of bonds issued by the municipality to aid in the construction of such railroad, are not in conflict with any constitutional provision.

They do not impose a tax upon property in other portions of the county for the benefit of the town, city or village, they simply deprive such other portions of the benefit derived from the taxation of railroad property in the municipality.

They are not violative of the provision of the State Constitution (§ 8, art. 7), prohibiting the payment out of the treasury of the State of any moneys, except in pursuance of an appropriation, etc.; as the fund realized from such taxation does not belong to the State or go into its treasury.

They are not repugnant to the constitutional provision (§ 20, art. 3), declaring that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied; the said provision simply specifies what may be done with a tax which has been legally imposed.

Said statutory provisions include all taxes of every description save those excepted therein, *i. e.*, school and road taxes, and so include town, village, city, county and State taxes.

The scheme of the act is practicable and not difficult of execution.

It seems the officers imposing the taxes, may ascertain the amount required to be paid under said provisions to the county treasurer and held by him as a sinking fund and specify the same in the warrant issued to the collector. If not so specified, the collector may make the proper deduction of school and road taxes and pay the balance to the county treasurer. If the duty of making the separation has not been discharged before payment to the county treasurer, it devolves upon him to make the separation and invest the proper amount as directed by the statute.

It is not requisite that the taxes so to be appropriated should be specially levied; they are to be levied in the same way as other taxes.

The said provisions are applicable to any municipality having bonds outstanding issued in aid of the construction of any railroad; and they are not limited to railroads constructed under said act of 1869.

Where, upon application under said act, of a taxpayer of a town, to compel the county treasurer to execute the provisions of the act, it

106	104
119	216

106	104
184	588
125	197

106	104
134	336

106	104
136	286
136	407

106	104
137	174

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appeared that the taxes imposed upon railroads in the town for the year specified, after deducting school and road taxes, were much more than the sum specified in the petition as the amount of such taxes paid to the county treasurer. *Held*, that it was no defense that the petitioner had not prayed for a sufficient amount; that the county treasurer could not complain of this, or of an order requiring him to set aside a less sum than the act required.

It seems, that in such case, notwithstanding the prayer of the petition, the county judge has power to ascertain the amount and compel the county treasurer to set aside for a sinking fund all the taxes which may appear to have been paid to him, and which, by the act, are devoted to that purpose.

It is no answer on the part of the county treasurer in such proceedings that if he sets aside the taxes as required by the act there will be a deficiency in other funds, the law having appropriated them for a specific purpose, it is his duty to so apply them, and he may not use them for other purposes.

All prior laws in conflict with said provisions or requiring a different disposition of taxes so collected, were thereby so far modified or repealed.

(Submitted May 6, 1887, decided June 7, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 31, 1884, which affirmed an order of the county judge of Wayne county dismissing the petition of the appellant made by him as a taxpayer of the town of Sodus, Wayne county, under the act (chap. 907 of the Laws of 1869, as amended by chap. 233 of the Laws of 1871), praying for an order requiring the county treasurer of said county to execute the provisions of said act by investing the sum of \$427.69, the amount of taxes other than school and road taxes received by him for the years 1881 and 1882, collected on the assessed valuation of two railroads in said town; to aid in the construction of which railroads the town had issued its bonds.

J. Welling for appellant. The defendant having received the money, \$427.69, applicable to the redemption and payment of the bonds and interest thereon, cannot justify his refusal to invest it as required by the act of 1869, upon the ground that the law devoting it to that purpose is unconstitutional. (*Ross v. Curtis*, 31 N. Y. 606; *People v. Brown*,

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55 id. 180-196.) The act of 1869 applies to all towns which have issued, or shall issue bonds to aid in the construction of "a railroad assessed in said town, city or village." (*Heaton v. Wright*, 10 How. Pr. 79, 83; *Crabb's Syn.* [ed. 1879] 761, 762.) This devotion of these taxes to the redemption of the bonds is a benefit to the towns which have aided in creating the property from which the taxes are received, and which is a public use for and benefit to the whole people of the State. (*Duanesburgh v. Jenkins*, 57 N. Y. 188, 189; *Bk of Rome v. Village of Rome*, 18 id. 38; *People v. Mitchell*, 35 id. 551; *Starin v. Genoa*, 23 id. 43; *Clark v. City of Rochester*, 28 id. 605; *Bridges v. Sup'r of Sullivan*, 92 id. 579.) The legislature could properly, and did, by this section 4, donate these taxes in aid of towns which had bonded to aid railroads, to lighten the burden of taxation necessary to pay their obligations entered into in aid of a public benefit. (*People v. Draton*, 35 N. Y. 380, 381; *Town of Guilford v. Sup'r*, 13 id. 149; *People v. Mayor, etc.*, 4 id. 419; *Brewster v. City of Syracuse*, 19 id. 116, 118.) The fact that these taxes were ostensibly raised for specific purposes, to which they were appropriated by other statutes than that invoked by the petitioner, afforded no excuse or defense to the treasurer for not investing or holding them, as required by this act of 1869. (*People ex rel. v. Baker*, 29 Barb., 81, 84, 87; *Bridges v. Sup'r of Sullivan Co.*, 92 N. Y. 570; *Monroe Savgs Bk v. City of Rochester*, 37 id. 365; *Litchfield v. Lemon*, 41 id. 124; *People v. Home Ins. Co.*, 92 id., 323-340.) The action of the board of supervisors of Wayne county, in refusing to appropriate these taxes to the purpose of redeeming these bonds, or as a sinking fund for their redemption, was inadmissible in evidence, as it afforded no excuse or justification for the defendant's refusal or neglect to comply with the requirements of this section. (*Bridges v. Sup'r of Sullivan*, 92 N. Y., 579.) These acts of 1869 and 1871 are not violative of any provision of the Constitution of this State. (Const. Debates

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[Argus ed.], 721, 722; *People v. Sup'rs of Chenango*, 8 N. Y. 317; *People v. Sup'rs of Chautauqua*, 43 id. 14.) Taxes assessed, collected and in the hands of a county treasurer, are not money in the treasury of the State, nor a part of any of its funds, or of funds under its management. (*Mayor, etc., v. Davenport*, 92 N. Y. 604, 616, 617.) These acts of the legislature are to be upheld as valid unless some constitutional restraint or prohibition against them can be found. Whether they may or may not, in their operations, be opposed to natural justice and equity is not a criterion to which their validity can be subjected. (*Bertholf v. O'Reilly*, 74 N. Y. 509, 516; *People v. Sup'rs of Ulster*, 36 Hun, 494; *Pres. v. Briggs*, 50 N. Y. 558, 559; *Town of Duanesburgh v. Jenkins*, 57 id. 188; *People ex rel. v. Briggs*, 50 id. 553-558; *People v. Albertson*, 55 id. 54, 55; *People v. Comstock*, 78 id. 356.) The bonds of the town of Sodus, to whose payment the taxes in question are sought to be applied, are not private or individual obligations made in aid of private, peculiar or speculative purposes of the town, or those of its inhabitants, but the obligations of a political division of the State, made to call into being and to aid to completion a public use for all, a benefit to the whole people. (*Lorillard v. Town of Monroe*, 11 N. Y. 394; 12 Barb. 161; *People v. Sup'rs of Montgomery*, 67 N. Y. 109; *People v. Sup'rs of Ulster*, 36 Hun, 496; *Town of Duanesburgh v. Jenkins*, 57 id. 188, 189; *Thomas v. Leland*, 22 Wend. 65; *B'k of Rome v. Rome*, 18 N. Y. 38; 19 id. 20; *People v. Mitchell*, 35 id. 551; *Clark v. Rochester*, 24 Barb. 446; *Sturin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, id. 456; *Grant v. Courtier*, 24 Barb. 222; *Benson v. Mayor, etc.*, id. 248; *Clark v. City of Rochester*, 28 N. Y. 605.) The legislature, in respect to taxation, being the representatives of the people, or in effect the people themselves, and having uncontrollable power over the whole subject of taxation, its object, purposes, exemption therefrom and details, must necessarily have absolute control over the product of taxation or taxes. (*People v. Dayton*, 55 N. Y. 380, 381; *Town of Guilford v. Sup'rs*,

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etc., 13 id. 149; *People v. Mayor, etc.*, 4 id. 419; *Brewster v. Syracuse*, 19 id. 116, 118; *B'k of Chenango v. Brown*, 26 id. 467; *Litchfield v. Vernon*, id. 133, 134; *People v. Flagg*, 46 id. 401; *Gordon v. Cornes*, id. 611, 612; *In re Van Antwerp*, 56 id. 261.) It is to be assumed, in the absence of proof to the contrary, that the board of supervisors of Wayne county has done its duty in respect to these taxes, and laid them out of view as being withdrawn from the taxes for State, county and other purposes, and assessed "generally upon the county at large a sufficient sum to cover the county charges (and State tax), in addition to the taxes for county purposes and other taxes levied upon railroads." (27 Hun, 175; 92 N. Y. 579, 580.)

C. H. Roys for respondent. As the appropriation act of 1881 is contradictory and irreconcilable with the acts of 1869 and 1871, the latter must be held to be repealed as to the State tax. (*Pet. Co. v. Embray*, 67 Barb. 261; *People v. Van Mort*, 64 id. 215; *Hartmann v. New York*, 51 How. 351.) The State and county tax of \$427.69 cannot be taken and used as a sinking fund, as required by the petitioner, under the acts of 1869 and 1871, because that money has been imposed and collected as taxes and paid over to the county treasurer by and in pursuance of other statutes, and for other and entirely different purposes. (2 R. S. [7th ed.], 956; *Phelps v. Williams*, 5 Alb. Law Jour. 204; *People v. Mead*, 24 N. Y. 114; *People v. Brown*, 55 id. 180.) The provisions of the acts of 1869 and 1871, relating to the sinking fund in question, are unconstitutional and void. (*Stuart v. Palmer*, 74 N. Y. 183; *Weisner v. Village of Douglass*, 64 id. 91.)

EARL, J. This is a special proceeding instituted by a taxpayer of the town of Sodus, Wayne county, in this State, to compel the county treasurer of that county to execute the provisions of section 4 of chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871. The material portions of that section are as follows: "All taxes, except

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school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village or city, on the assessed valuation of any railroad in said town, village or city, for which said town, village or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, city or village lies. It shall be the duty of said treasurer, with the money arising from taxes levied and collected as aforesaid, which has heretofore been or shall hereafter be paid to him (including the interest thereon) to purchase," bonds mentioned to "be held by said county treasurer as a sinking fund for the redemption and payment of the bonds issued or to be issued by said town, village or city to aid in the construction of said railroad or railroads. In case any county treasurer shall unreasonably refuse or neglect to comply with the provisions of this act, any taxpayer in any town, village or city theretofore having issued bonds in aid of the construction of any railroad or railroads, is hereby authorized to apply to the county judge, on petition, for an order compelling said treasurer to execute the provisions of this act. And it shall be the duty of said county judge, upon a proper case being made, to issue an order directing said county treasurer to execute the provisions of this act." Our main duty upon this appeal is to construe this section. It has several times been under consideration in the courts, and the views of judges in reference to it have have not been in entire harmony.

All taxes, except school and road taxes, imposed upon the railroads mentioned, are required to be paid over to the county treasurer; and this obviously means all the taxes of every description, including town, village, city, county and State taxes, except school and road taxes. The sums thus paid to the county treasurer are to constitute a sinking fund for the payment and redemption of the municipal bonds. There is nothing impractical in the scheme of this section. It is easy for the officers imposing the taxes to ascertain their amount after deducting school and road taxes; and the amount to be paid

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to the county treasurer and held by him for a sinking fund can be specified in the warrant issued to the collector. (*People ex rel. Martin v. Brown*, 55 N. Y. 189.) But if not so specified, it must always be easy for the collector to make the proper deduction of school and road taxes, and then, in obedience to the command of the statutes, to pay the balance to the county treasurer. If the duty of making the separation of the school and road taxes from the other taxes has not been discharged before payment of the taxes to the county treasurer, it will rarely, if ever, be difficult for him to make such separation, and it will be his duty to make it and invest the proper amount as directed by the statute. The authorities of towns, villages, cities and counties have no right to divert or appropriate these taxes for other purposes. (*Bridges v. Supervisors of Sullivan Co.*, 92 N. Y. 570.) They never come into the hands of the county treasurer for any other purpose than that mentioned in the section, and they are devoted by law to the benefit of the municipality in which they are collected, and must be held and invested in the mode directed for its benefit. The taxes which are to be paid into and constitute the sinking fund need not be specially levied, but they are to be levied in the same way as other taxes, and all the taxes thus levied are to be devoted to the purpose mentioned. It is quite true that a deficiency may thus be caused in funds required for town, village, city, county and State purposes, but the local authorities must in some way make provision for such deficiency and there is ample power in the statutes to do so.

The provisions of this section are applicable to any municipality which has bonds outstanding issued under any act in aid of the construction of any railroad within its borders. The statute speaks of taxes upon the assessed valuation of "any" railroad for which the municipality has issued or shall issue bonds to aid in the construction of such road. And it authorizes any taxpayer in any town, village or city which has issued bonds in aid of the construction "of any railroad or railroads" to petition to the county judge for an order com-

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selling the county treasurer to execute the provisions of the act. It is not correct, therefore, to say that these provisions are to be executed only in the case of railroads constructed under the act of 1869 and the amendments thereto. The provisions are broad, comprehensive and general, and were intended for the benefit of all municipalities bonded in aid of railroads constructed in or through them.

It makes no difference as to the duty of the county treasurer that the taxes thus to constitute the sinking fund were not expressly collected or paid over to him for that purpose. The statute appropriates the taxes and makes it his duty to separate and set them apart for the sinking fund.

We do not perceive that these provisions of sections 4 are in conflict with any constitutional provision. They do not impose a tax on property in other towns of the county of Wayne, as claimed by the respondent, for the benefit of the town of Sodus. They simply deprive other portions of the county, of the benefit to be derived from the taxation of the railroad property within the town of Sodus. As to other portions of the county, it is practically the same as if the railroad property was exempt from taxation. It would be perfectly competent for the legislature to exempt all the railroads from taxation in the towns bonded to aid in their construction, and in making such exemption no constitutional provision would be violated. So too, the legislature could devote all the taxes imposed upon such railroads to town, village or city purposes; and this is what it has done. These provisions cannot even be charged with any great injustice. The railroad property thus to be taxed was, in the main, created by the municipalities bonded for their construction, and until they have either been reimbursed for their expenses which they have thus incurred, or have been able otherwise to pay their bonds, it is certainly not very unjust that that they should have the benefit of the taxes imposed upon the property which they have thus created.

These provisions are not in conflict with section 8 of article 7 of the Constitution, which provides that "no moneys shall

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ever be paid out of the treasury of this State, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum." This fund was not in the treasury of the State and never belonged to the State or to any fund under its management. Hence that section of the Constitution has no application to this case.

It is also clear that these provisions do not violate section 20 of article 3 of the constitution which provides that "every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." The law we are considering simply specifies what may be done with a tax which has been legally imposed. The constitutional provision referred to can have no application to such a case as this. (*In re McPherson*, 104 N. Y. 306.)

We are, therefore, of opinion that the provisions of section 4 are not in conflict with the constitution, that their meaning is reasonably plain and that it is practicable to execute them. It, therefore, only remains for us to inquire whether there is anything peculiar to this case which justifies the county treasurer in his refusal to execute these provisions.

What we have already said is a sufficient answer to most of the other objections made. It appears quite clearly from the petition and answer and the evidence upon the hearing before the county judge that the taxes imposed upon these two roads for the year 1881, after making deductions for school and road taxes, were much more than \$427.69; but the petition alleges that that was the sum over and above school and road taxes which was paid to the county treasurer as the railroad taxes of that year; and upon the hearing before the county judge, the county treasurer admitted that the amount

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of all taxes collected upon the assessed valuation of the railroads in the town of Sodus for the year 1881, and paid to him was the sum of \$2,602.09, of which sum \$427.69 was the portion of the railroad taxes other than school and road taxes, and it was that sum which the petitioner prayed that the county treasurer be compelled to pay, invest or set apart as a sinking fund under the fourth section. It is probably true, upon all the facts appearing in the case, that the county treasurer ought to have set aside a larger sum in the execution of his duties under the act. But it is no defense that the petitioner has not prayed for a sufficient amount, and that possibly the county treasurer could be vexed with further proceedings requiring him to set aside a further amount. It is his duty to set aside and invest as a sinking fund all the taxes paid to him and appropriated by section 4 for that purpose. But if the county judge should make an order requiring him to set aside a less sum than he ought to, certainly he cannot complain of such an order. Upon a rehearing of this case before the county judge, notwithstanding the prayer of the petition, the county treasurer could be compelled to set aside for a sinking fund all the taxes which may appear to have been paid to him and were devoted by the statute to that purpose, and there is ample power conferred upon the county judge to ascertain the amount and make an order accordingly.

It is no answer for the treasurer to say that if he should set aside these taxes for a sinking fund there would be a deficiency in other funds, and that he may not have money enough to pay the obligations of the county to the State and to the county officials and county creditors. He has no right to use the money, produced by these taxes, to discharge any of these obligations. The law has appropriated it for a specific purpose, and it is his duty to apply it to that purpose.

There are no subsequent statutes which in any way interfere with these provisions of section 4. The general laws of the State for the imposition and collection of taxes do not interfere, and were not intended to interfere with this section. These taxes were devoted to a special purpose by section 4,

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and all prior laws in conflict with that section, or requiring a different disposition of taxes thus collected, are so far modified or repealed; and our attention has been called to no subsequent statute which has any bearing, whatever, upon the questions here involved.

We are, therefore, of opinion that the orders of the General Term and of the county judge should be reversed, and the proceedings remitted to the county judge for a further hearing upon the petition, and that the appellant recover costs against the respondent in this court and in the Supreme Court.

All concur.

Ordered accordingly.

HENRY M. CASE, Respondent, v. ISAAC R. PHARIS, Appellant.

A bill of particulars, like a pleading, may be amended.

A plaintiff is not bound to furnish a statement of payments or off-sets which he has voluntarily credited, and where he has done so in such a manner as by mistake to have periled his right or made ambiguous his meaning, the allowance of an amendment striking out the statement is proper.

Plaintiff claimed to recover, among other things, for board furnished defendant; the latter answered denying the claim, and set up a counter-claim for board furnished by him to the plaintiff, who replied, denying the counter-claim. Plaintiff served a bill of particulars, which contained a charge against defendant for board and a credit to him for similar service of less amount. The trial was conducted by both parties upon the theory that the question of legal liability for board was an open one, and no objection was made by defendant to evidence offered to defeat his claim by plaintiff. The referee refused to allow either claim upon the ground that, while board was furnished as alleged, the relations of the parties were such that, in the absence of an express agreement, no promise to pay on either side could be implied. *Held*, that having reference to the form of the pleading and the issues raised, the credit given in plaintiff's bill of particulars was not a conclusive admission of legal liability to that amount; also, that if defendant had intended to rely upon the alleged admission, he should have raised the question on the trial when the bill might have been amended by striking out the credit; and, having failed so to do, he could not raise it on appeal.

(Argued May 9, 1887; decided June 7, 1887.)

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 29, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Louis Marshall for appellant. A bill of particulars is an amplification of the pleading to which it relates, and is to be construed as forming a part of it, and has the effect to restrict the proofs and to limit the recovery to the matters therein set forth. (*Mathews v. Hubbard*, 47 N. Y. 429; *Higenbotam v. Green*, 25 Hun, 216; *Bowman v. Earl*, 3 Duer, 694; *Melvin v. Wood*, 3 Keyes, 535, 536; *Brown v. Williams*, 4 Wend. 368; *Starkweather v. Kittle*, 17 id. 20; *Dwight v. Ger. L. Ins. Co.*, 84 N. Y. 506; *Gloss v. Clark*, 87 id. 276.) The party who explicitly admits by his pleading that which establishes the right of his opponent, will not be permitted to deny its existence, or to prove any state of facts inconsistent with that admission. (*Paige v. Willett*, 38 N. Y. 28; *Tell v. Beyer*, id. 161; *Fleischman v. Stern*, 90 id. 114; *Donovan v. Board of Education*, 55 How. 176; *Thomas v. Austin*, 4 Barb, 265; *Robbins v. Codman*, 4 E. D. Smith, 315; *Crosbie v. Leary*, 6 Bosw. 315; *Dunham v. Cudlipp*, 94 N. Y. 129, *White v. Smith*, 46 id. 418; *People v. Van Rensselaer*, 9 id. 291, 319; *Bride v. Payson*, 5 Sandf. Sup. Ct. 210; *Ballou v. Parsons*, 11 Hun, 602.) It is the duty of a party to an action to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken. (*Clark v. Dillon*, 97 N. Y. 370; *Bates v. Rosekrans*, 23 How. Pr. 98; *Moore v. Lehman*, 52 N. Y. Super. 283.) If the pleadings and bills of particulars in this action had been verified, the plaintiff could not have been convicted of perjury for interposing a constructive denial of liability for board and lodging in the reply, when, in his amplified complaint in the action, he

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expressly admitted such liability. (*Clark v. Dillon*, 97 N. Y. 376.)

Thomas Hogan for respondent. The object of a trial is to do complete justice between the parties, and they both have an opportunity to be heard irrespective of any theories the parties may entertain when they file their pleadings. (*Muldowney v. Morris & Es. R. R. Co.*, 42 Hun, 447.) The defendant cannot take that portion of the bill of particulars which is favorable to himself and exclude the other portion. He must take the whole if he takes any (*Vanderbilt v. Schreyer*, 21 Hun, 537, *Stuart v. Kissane*, 2 Barb. 494; *Craig v. Tappan*, 2 Sandf. Ch. 78-85; *Goodyear v. De La Vargne*, 10 Hun, 537.) The effect of the bill of particulars is not as broad as claimed by the defendant. (*Putney v. Tynq*, 24 W. Dig. 344.) An objection to inconsistencies in allegations of a complaint cannot be reached by assignment of error questioning the sufficiency of the complaint in the Supreme Court; and after verdict and judgment in court below such objection will be regarded by Supreme Court as waived. (*Smith v. Freeman*, 71 Ind. 85; *Bass v. Smith*, 61 id. 72.) Where parties litigate the counter-claim contained in an answer, to which no reply has been served, the admission by failure to reply would be considered as waived. (*Randolph v. Mayor, etc.*, 63 How. 68.)

FINCH, J. The pleadings in this case were very general in their form. The complaint alleged, among other things, that the defendant was indebted to the plaintiff for board furnished, to which the former answered by a denial, putting the claim at issue. The defendant further answered by setting up a counter-claim for board furnished by him to the plaintiff, to which the latter replied with a denial. On this state of the pleadings, if nothing else had occurred, either party would have been at liberty, as against the other, to have resisted his adversary's claim for board upon the ground that the relations between the parties, as father-in-law and son-in-law, and the

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attendant circumstances were such as to negative any implied contracts to pay for board and require for success proof of an express agreement to pay; and if that defense failed, then to establish the amount and value of the board furnished. The two positions were not necessarily inconsistent. It might turn out in favor of either party that, while there was no implied contract, there was yet an express agreement to pay on one side and not on the other, and so, respectively, each party could insist upon his own claim while denying his adversary's, and neither conceded an implied contract by asserting his own right of action. But at some time each party furnished to the other a bill of particulars, and upon that served by the plaintiff the question arises argued on this appeal. It contained a charge against the defendant for board, and a credit allowed him for similar service of a less amount; and that credit, it is claimed, admits that for board to some amount the defendant was entitled to be paid; and so the referee erred in refusing wholly an allowance for that item, and on both sides, upon the ground that in the absence of an express agreement the circumstances repelled an implied one. We are now reminded that a bill of particulars is to be deemed an amplification of the pleadings and that similar admissions have been held to be sufficient basis for a judgment. It may be that the credit here given was an admission of the fact that board to the amount stated was furnished by the defendant to the plaintiff, but we do not think, having reference to the form of the pleadings and the issues raised by them, that the credit is a conclusive admission of legal liability to that amount. It is impossible to harmonize such a liability with the denials of the answer and reply, and, therefore, I think the bill of particulars must be construed to contain only a conditional or contingent admission framed to operate in a possible emergency. As no item could be proved on the trial ordinarily, unless embraced in the bill, it became necessary to name in that every charge which upon any theory at the trial might become admissible; and so the plaintiff while resisting the defendant's claim upon a ground equally fatal to his own might guard

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against the possible failure of that resistance by pleading and itemizing his own charge for board as in excess of the defendant's, and the credit given is in connection with the charge made and upon the theory that both charge and credit may by possibility prove to be a legal liability. The admission fairly requires to be treated as a concession of the fact that board had been furnished but does not waive the right claimed by the denial on each side of contesting a resultant liability flowing from the fact admitted. It is as if the plaintiff had said — board was furnished, so much by me and so much by my adversary, but I deny that either, for a reason which affects both, is a legal charge; yet if mine is allowed it amounts to so much, and I will prove it at that, while my adversary's is the less sum which in that event I admit. If this was hypothetical pleading, or the theories were in one view inconsistent, it is further to be observed that no objection was made upon the trial in any manner raising the question. The trial went from its beginning to its end upon an assumption that the question of legal liability for board was an open one on each side, and if defendant held the contrary he should have objected to the evidence offered to defeat his claim and relied upon the alleged admission. The attention of the referee would then have been called to it, and he could have ruled upon it and possibly the plaintiff might then have sought leave to amend, and obtained permission to strike out the credit as made under a mistake as to its effect and construction. A bill of particulars, like a pleading, may be amended. (*Melvin v. Wood*, 3 Keyes, 533.) And when the amendment sought is to strike out what is unessential to the bill and a needless addition, leaving the plaintiff's side of the account unchanged, it would seem quite possible to permit it. It is not the office of a bill of particulars to furnish a defendant with facts whereon to found an affirmative defense in his behalf. (*Drake v. Thayer*, 5 Robt. 694.) A plaintiff is not bound to furnish a statement of payments or offsets which he has voluntarily credited. (*Ryckman v. Haight*, 15 Johns. 222; *Williams v. Shaw*, 4 Abb. Pr. 209.) Where he has done so in such manner as by mistake to have

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perilled his right or made ambiguous his meaning an amendment allowed would not be an unwarranted discretion. But in this case the defendant went to judgment without once relying upon the alleged admission, or drawing attention to it, or claiming anything under it. He sees the evidence which defeats it offered and given in silence, and not until the decision is made, when opportunity for amendment is gone, does he raise the point. We think that is too late and furnishes no just ground for a reversal of the conclusion reached.

The judgment should be affirmed with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

WILLIAM B. HOLDSWORTH, as Master, etc., Appellant, v.
P. A. DE BELAUNZARAN et al., Respondents.

Defendants chartered a vessel for a voyage from New York to Cadiz; they to pay to plaintiff a sum specified on delivery of the cargo at Cadiz, "in cash, without credit, discount or commission." Plaintiff performed the obligations of the charter party on his part. Defendants' agent at Cadiz, who had funds in his hands to pay the freight, having been advised by plaintiff that he desired to remit a portion of the same stipulated to his principal, agreed to purchase and remit a bill of exchange for the amount, and thereafter represented that he had so done, and defendants, relying upon such statement on payment or the balance, settled with the said agent, who had not, in fact, made the remittance as agreed, but instead thereof had drawn and transmitted his own draft on defendants, payable sixty days after sight for the amount, which draft defendants refused to accept or pay. Said agent had no authority to draw on defendants and had no funds in their hands. Plaintiff did not know that such draft was drawn until after he left the port of Cadiz and never agreed to accept it, but supposed the remittance was made as agreed. In an action to recover the amount of freight unpaid *held*, that defendant was entitled to judgment; that although plaintiff assented to a mode of payment different from that stated in the charter party, yet as the condition upon which the assent was given was not performed, it did not constitute in any sense a payment of defendants' debt.

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It seems that if plaintiff had accepted the personal draft of the agent, or had extended to them a credit for the sum, in satisfaction of defendants' obligation, it would have operated as a discharge.

Holdsworth v. De Belaunzaran (34 Hun, 882) reversed.

(Argued May 9, 1887; decided June 7, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 6, 1884, which reversed a judgment in favor of plaintiff entered upon the report of a referee. (Reported below, 34 Hun, 382.)

The nature of the action and the material facts are stated in the opinion.

Joseph A. Shoudy for appellant. The debtor's own promise, even though it be in the form of another obligation, does not extinguish his indebtedness, unless it is expressly so agreed. (*B'd of Education v. Fonda*, 77 N. Y. 350, 362.) When a creditor agrees to accept what is the equivalent of gold coin in lieu of the coin itself, he may not, by false and fraudulent pretenses, be compelled to put up with something that is perfectly worthless, which he never agreed to accept. (*Sandford v. Handy*, 23 Wend. 260, 266; *Bennett v. Judson*, 21 N. Y. 238; *Hathaway v. Johnson*, 55 id. 96; *Lee v. Village of Sandy Hill*, 40 id. 442-448; *Krumm v. Beach*, 96 id. 398; *Craig v. Ward*, 3 Keyes, 387; *Sharp v. Mayor, etc.*, 40 Barb. 271; Story on Agency, § 452.) The fraudulent acts of Poggio were within the scope of his authority, and were, therefore, binding upon the defendants. (*Sandford v. Handy*, 23 Wend. 265, 266; *Mott v. Consumers Ice Co.*, 73 N. Y. 543; *Lee v. Village of Sandy Hill*, 40 id. 448.) This cannot be considered a case where the vessel voluntarily received something other than money, and thereby waived payment of the money, for the reason that the master never did receive anything that he had agreed to accept. (*Shepard v. De Bernales*, 13 East. 565; *Abbott on Ship*. 276; *Tapley v. Martens*, 8 T. R. 451; *Christy v. Rowe*, 1 Taunt. 300.)

G. L. Rives for respondents. Where payment is stipulated to be made at a particular place and in a particular

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manner, and the debtor puts the requisite funds in the hands of his agent at that place, if the creditor chooses not to receive payment in the manner stipulated he does so at his own risk. (*Darnall v. Morehouse*, 45 N. Y. 64; *People ex rel. v. Cromwell*, 102 id. 477; *Strong v. Hart*, 6 B. & C. 160; *Abbott on Ship*. 414, 420; *MacLachlan on Ship. and Adm.* 305; 1 *Maude & Pollock's Merch. Ship*. 378.) The plaintiff has been guilty of laches in not presenting his draft for acceptance at the proper time, and in not making any effort whatever to collect of the drawer. (Pars. on Ship. and Adm. 305; *Grant v. Wood*, 1 Zabris. [21 N. J. L.] 292; *Smith v. Miller*, 52 N. Y. 545; *First Nat. B'k v. Fourth Nat. B'k*, 24 Hun, 241; *Everett v. Collins*, 2 Camp. 515; *Drake v. Mitchell*, 3 East, 259; *Shepard v. De Bernales*, 13 id. 565, 570; *Anderson v. Hillies*, 12 C. B. 499; *Wyatt v. Marquis of Hartf.*, 3 East, 147; *Marsh v. Pedder*, 4 Camp. 257; *Robinson v. Read*, 9 B. & C. 449; *The Salem's Cargo*, 1 Sprague's Dec. 389; *People v. Cromwell*, 102 N. Y. 477.)

RUGER, Ch. J. In November, 1881, the defendants chartered the British bark "Bessie" for a voyage from New York to Gibraltar and Cadiz, and for its return to New York or some other port in the United States to be named by the charterers at Cadiz. The charter party provided that the defendants should pay the plaintiff £1,100 for the round trip, of which sum £620 were made due and payable, upon proper delivery of the cargo at Cadiz, "in Spanish gold coin at the rate of \$4.80 to the pound sterling." "All payments to be made in cash, without credit, discount or commission." Other portions of the stipulated sum of £1,100 were made payable at Gibraltar and the home port; but no question arises in the case over the performance by the defendants, in that respect, of their contract obligations.

The defendants loaded the bark at the port of New York with a general cargo, consigned to various persons at Gibraltar and Cadiz, under bills of lading in the usual form, specifying the amount of freight payable by the consignees on each

parcel of goods. The full performance by the plaintiff, of the obligations of the charter party, is admitted by the defendants, and their liability for the payment of the full amount stipulated, according to the provisions of the charter party, follows as the necessary consequence of this performance by the plaintiff.

The only question in the case is, therefore, whether the defendants have performed their obligation by causing payment of the sum of £620 to the plaintiff at Cadiz, according to the terms of the charter party.

Before leaving New York, the defendants handed to the plaintiff a letter of instruction by which he was directed to proceed directly to Gibraltar, consigning himself to one Gomez, and after discharging the consignments at that place to proceed to Cadiz, consigning himself to Poggio Hermanos, who, it was stated, had full instructions to serve the master in any matter concerning his vessel. It was shown by the evidence that Poggio Hermanos paid to the plaintiff at Cadiz the sum of \$528.40 of the sum of £620, leaving apparently unpaid thereon £509, 18s. and 4d., or \$2,447.60 and this is the sum in dispute in this action.

As to the transaction at Cadiz between the plaintiff and Poggio, the referee found as follows: "That while discharging the cargo of said vessel at the port of Cadiz, the said Salvador Poggio inquired of the plaintiff whether he wished to remit any portion of his charter money to his principals, and the master replied that he did wish to remit to his principals through the firm of Baring Brothers of London; that thereupon the said Poggio said to the plaintiff that he would purchase a bill of exchange and remit the same to the said firm of Baring Brothers, and a few days thereafter, when the cargo was about half unloaded, he represented to the plaintiff that he had purchased a bill for £509, 18s. 4d. at 47d. to the dollar, and had remitted the same to Baring Brothers for the account of the master and agent of the said vessel; that said master believed the said statement and representation of said Poggio and relied thereon, and had the accounting

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hereinafter referred to, and settled with the said Poggio upon the faith of said representation being true; that the statement and representation of the said Poggio that he had made such remittance to Baring Brothers was false and untrue, but, on the contrary, the said Poggio, on or about the 16th day of February, 1882, drew his draft in the firm name of Poggio Hermanos upon the defendants by their firm name for the sum of £509, 18s. 4d., * * * payable at **sixty days** after sight to the order of Baring Brothers, **and transmitted** the same to Baring Brothers; **that Baring** Brothers received the same and **presented it to** the defendants on or about the **1st day of March**, 1882, for acceptance, and thereafter, when the same became due, presented it for payment, and the said bill was neither accepted nor paid, but was protested for non-payment, and has never been paid." That the firm of Poggio Hermanos had no funds with the defendants, and had no authority to draw upon them. "That the master of said vessel received no more than \$2,833.40 on account of said charter party, leaving a balance of \$2,447.60, which was due and payable at Cadiz aforesaid, according to the terms of the charter party. No part of this sum has been paid." That "*the plaintiff never agreed to receive the said draft in payment thereof*, and did not know that the same had been drawn until long after he left the port of Cadiz, but supposed that a remittance had been made as agreed by the said agent."

Shortly before leaving Cadiz the master applied to Poggio for a final settlement of the money payable to him at that place, and Poggio rendered an account in which he charged the master with the sum of £509, 18s. 4d., sent to Baring Brothers February 14, 1882, and various other items of account, together with a sum paid in cash February 28, 1882, sufficient to make up the whole amount of £620. The plaintiff first learned of the mode of remittance attempted by Poggio when he was at Gloucester, after his voyage was completed, and never at Cadiz or elsewhere approved of or accepted the method of remittance adopted by Poggio.

We have also carefully read the evidence upon which the

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findings were based, and are of the opinion that they were quite as favorable to the defendants, as the proof would warrant. Upon these facts the referee made a report in favor of the plaintiff, upon which judgment was entered. The General Term, upon appeal to that court, reversed the judgment and ordered a new trial. From that order the plaintiff appealed to this court upon the usual stipulation for judgment absolute in case of affirmance here.

The ground upon which the defense to the action was based is stated in the answer to be as follows: "The said firm of Poggio Brothers *offered to give the plaintiff, instead of cash, their draft or bill of exchange* for the said last mentioned amount (\$2,447.60), *to which the plaintiff assented and requested the said Poggio Brothers to draw the said bill of exchange* to the order of Baring Brothers & Co., of London; * * * that the plaintiff *accepted the said draft voluntarily* and for his own convenience, and did not insist upon payment in cash of the said balance of \$2,447.60."

It is quite unnecessary to discuss the question of the validity of such a defense, if it had been established by proof, because in all of its material allegations it was in direct conflict with the findings of the referee, and the fair and reasonable deductions to be made therefrom. The General Term, however, seems to have become impressed with the idea, notwithstanding the express findings of the referee, and the uncontradicted testimony of the plaintiff, that the personal draft of the Poggios, payable sixty days after sight by the defendants, in New York, had in some manner been accepted by the plaintiff, in satisfaction of the sum payable by the terms of the charter party at Cadiz.

The discussion of the case in the courts below has elicited not only an able opinion from the referee, but also one from each of the judges of the General Term of the Supreme Court, in which a radical difference of views as to the merits of the case has been shown to exist, two of the judges favoring a reversal of the judgment for the plaintiff, ordered by

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the referee, and one favoring an affirmance. The theory upon which the majority of that court proceeded will best be presented by brief extracts from their respective opinions. Judge BRADY says: "According to the charter party, payment was to be made at Cadiz by the agent of the defendants, and that the draft *which was taken by the plaintiff in lieu of money was drawn at his request*, that he might make remittances, and, of course, without the knowledge of the defendants; and it is to be further noted that the plaintiff, relying upon the statement of the agent that the bill was drawn upon Baring Brothers, *made no personal inspection of it*, and thus enabled the defendant's agent to practice what appears to have been a fraud." Judge DAVIS, also writing for reversal, says: "The freight, to an amount exceeding the sum due to the plaintiff, was collected by Poggio Brothers, and was known to the plaintiffs to be in their hands. * * * *The plaintiff had only to demand and receive them.* He did receive a portion of them, but the residue he desired, for his own purposes, to remit to Baring Brothers as 'soon as possible.' The defendants were under no obligation to do that for him, and Poggio Brothers were not their agents to make such remission. * * * *The act of leaving the money due him in the hands of Poggio Brothers to purchase such draft was solely that of the plaintiff.*"

We think the conclusions were not warranted by the findings of the referee, and as the reversal must be deemed by us to have been based altogether upon questions of law and not upon the facts, we conclude that the order of reversal was erroneous. The argument of the learned judges writing for reversal ignores the referee's finding that the plaintiff never agreed to accept the draft of Poggio and seems to us to have proceeded upon a misapprehension of the facts of the case, and the nature of the relations existing between the defendants and Poggio Hermanos. It should be borne in mind that the Poggios were, for all purposes, connected with the vessel and its cargo, the agents of the defendants, and, as is now claimed by the defendants, were also agents to make payment to the

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plaintiff of the sum due him upon the charter party at Cadiz. The provision of the charter party, for partial payment at Cadiz, was for the benefit of the plaintiff and he could waive performance of that stipulation, or any of its conditions, without injury to the defendants. Thus he could receive payment in other funds than Spanish gold coin, or could allow discount or commission, or extend credit to the agent without prejudicing the interests of the defendants.

If, however, he dealt with the agent and accepted payment in any other form than that provided by the charter party, he would act on his own responsibility and would thereby take the risk of any loss arising out of any change in the mode of performing the contract. By the performance of the stipulations of the charter party by the plaintiff, the defendants became indebted to him in the full sum of the compensation earned by the vessel. They then rested under an active obligation to make this payment, and could be relieved from it only by showing payment or a readiness and ability to pay by themselves, or their agents at the time and place of performance. By consigning the vessel and cargo to Poggio Hermanos with authority to collect the freight payable at Cadiz, they had, indeed, placed their agents in funds to meet their obligations, but it was also their duty to see that the agent performed them. The charter money was not payable to the plaintiff until after delivery of the cargo, and he had no control over the collections for freight made by Poggio, or the defendant's funds in their hands. Although the defendants consigned the bark and its cargo to the Poggios, and authorized them to collect the freight payable by its different consignees at that place, there is no express language either in the charter party or the defendant's letter of instructions to plaintiff, making them his agents to pay the plaintiff, or requiring him to call upon Poggio Hermanos or any other person for the amount due him at Cadiz, or directing him to make demand of that sum of any person. If there was any duty resting upon the plaintiff to make demand from any one, it arises from the fact that Poggio Hermanos, were the defendants' agents and consignees

at Cadiz, and the usual course of trade pointed to them as the persons through whom the defendants had elected to perform their obligation of making payment at that place. The plaintiff had no lien upon the cargo for his charter money, and no means of compelling payment of the amount due him at Cadiz, for it was payable only after delivery of the cargo, and in the natural course of things there would be no one in funds to make payment, until the defendant's agents had collected freight, from the various consignees of the cargo. This could take place only by the delivery of the cargo, from time to time, to its consignees and the collection of the freight money due thereon by defendants' agents. The plaintiff had no control over the collection of this freight, or the defendants' money in the hands of Poggio Hermanos. He had no other means of obtaining money of the Poggios except by asking for it, and when he had done this, and had been refused, or his request had been ignored or evaded, he had done all that was required of him to fix the defendants' liability. The defendants' contract was that the agents at Cadiz would pay the plaintiff £620. The plaintiff frequently made application for payment of the charter money to the Poggios, and when he asked for a final settlement the agents' reply was substantially an allegation that they had already paid such moneys to the plaintiff's principals. It is true that the plaintiff might have denied this statement or still insisted upon receiving his freight money, but there is no reason to suppose that the Poggios would have retracted their statement or have repaid money which they falsely, but yet deliberately, asserted they had already paid. It would have been quite ungracious in the plaintiff to have disputed the assertion of the agents to whose kind offices the defendants had commended him, and it would have been quite ineffectual if he had done so. He had no power to make them pay money, payment of which they had avoided by falsehood, and no means, except persuasion, to induce them to fulfill the obligations they owed to the defendants.

It was impossible for plaintiff then to determine whether

Poggio's statement was true or not. He never had an opportunity to inspect the bill said to have been remitted, or to elect between the reception of the gold coin by himself, or the remittance of the bill. The allegation, that they had remitted was the excuse given by the defendants' agents for not making payment according to the terms of the charter party, and, therefore, he had no alternative except to rely upon it, and in case it proved untrue to look to his charter party for indemnity.

The plaintiff had no legal, enforceable demand or claim against Poggios, and to require him now to accept them as his debtors, and to prosecute the Poggios' upon their draft, would make a contract for him to which he has never assented. The defendants' contract was to pay the plaintiff at Cadiz £620, and when the plaintiff has shown that he afforded the defendants' agents at that place an opportunity to make such payment and they declined to do so, it constitutes a breach of the contract by the defendants, rendering them liable for the sum unpaid.

The case is simply that the defendants' agents, converted the money entrusted to them by their principal, to their own use — and when called upon to discharge their principals' obligation, falsely alleged that they had applied it to that purpose. The plaintiff had no power to prevent the fraudulent conversion of the money by the agents, or to compel its lawful application. All that he did was to acquiesce in its remittance to the ship's owners after it was claimed that it had been made, and if it had actually been remitted it would have discharged the charterer's debt. The plaintiff simply assented to a mode of payment which was not pursued, and the condition upon which this assent was given, was never performed. This did not constitute, in any sense, a payment of the principals' debt.

It cannot be disputed that, if the plaintiff had, at Cadiz, accepted the personal draft of the Poggios' for the amount due to him, or had extended a credit to them for such sum in satisfaction of the defendants' obligation, it would have

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operated as a discharge to the defendants, but it is indisputable that the plaintiff never did so, and in fact never knew the mode of the pretended payment until after such knowledge was of no benefit to him.

The legal principles applicable to this case are so elementary and familiar that it needs no citation to illustrate them. In truth the main cause of difference in this case arises over the different views of the fact taken by the learned judges writing in the court below, and not over any question of law.

The order of the General Term should be reversed, and the judgment entered on the report of the referee affirmed.

All concur, except EARL and PECKHAM, JJ., dissenting.

Order reversed, and judgment affirmed.

FRANKLIN WOODRUFF et al., Respondents, v. FREDERICK C.
HAVEMEYER et al., Appellants.

Defendants were the owners and consignees of certain cargoes of sugar which were transported to New York under bills of lading, by which the carrier agreed to carry them to that port "to be delivered within reach of the steamship's tackles" to defendants. This clause in each bill was followed by a provision giving the steamer the option to discharge cargo at New York or Brooklyn, the consignees to pay landing and wharfinger charges thereon, including storage, at specified rates. The vessels on which the sugar was shipped carried general cargoes, including other sugars. On reaching New York they stopped at the regular pier of the company and discharged part of their cargoes, and then under the option in the bills of lading proceeded to Brooklyn and landed the sugars upon plaintiffs' wharves in that city, and within twenty-four hours they were delivered. Defendants were ready with lighters to receive the sugars direct from the vessel and demanded such delivery. *Held* that plaintiffs were entitled to maintain an action to recover the landing and wharfinger's fees specified in the bills of lading; that the option contemplated, in case it was exercised, a delivery upon a wharf in Brooklyn, and defendants had no right to insist that the cargoes should be delivered from the side of the ship; also that the contract was enforceable by plaintiffs, as the receipt of the cargoes on their wharf was in legal effect a service rendered by plaintiffs upon employment of the carriers, duly authorized to contract for defendants for the service at the specified rates.

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A bill of lading, in general, is binding upon and protects all persons who by means of or under it, become the owners or custodians of the goods.

Also, *held*, that the provision of the act of 1872 (§ 2, chap. 320 Laws of 1872), in relation to rates and wharfage, etc., in the cities of New York and Brooklyn, which authorizes a charge specified for goods remaining on a wharf for every day after the expiration of twenty-four hours from the time of landing, could not be construed as prohibiting the owner of a private wharf from contracting for the landing or deposit of goods upon his wharf on such terms as might be agreed upon, or as requiring him to store goods for any time without compensation.

(Submitted May 9, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of February, 1885, which affirmed a judgment in favor of plaintiffs, entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

The plaintiffs were owners of certain wharves, piers and warehouses at the foot of Joralemon street, in the city of Brooklyn, within the port of New York, erected on land under water within the boundaries mentioned in chapter 156 of the Laws of 1848, and chapter 313 of the Laws of 1860. The defendants were owners and consignees of certain cargoes of sugar, imported from Havana by Ward's line of steamers between November, 1880, and November, 1882, which, upon the arrival of the vessels transporting the same, were landed by the carrier upon the plaintiffs' wharves, and were, within twenty-four hours thereafter, delivered by them to the defendants. The sugars were transported from Havana to New York under bills of lading, by which the carrier agreed to carry them from Havana to the port of New York, "to be there delivered, within reach of the steamship's tackles, unto Messrs. Havemeyer and Elder, or his or their assigns," upon payment by the consignees of the freight and primage specified. This primary clause in the bill of lading was followed by a provision, out of which, and the action of the carriers thereunder, arises the present controversy. That

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provision is as follows: "It is expressly stipulated that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer in the aforesaid port of New York (steamer has option of discharging cargo at New York or Brooklyn, consignees of cargo to pay charges thereon as expressed in the margin), and they shall be received by the consignee thereof, package by package, as so delivered," etc. In the margin of the respective bills of lading is this printed notation: "Landing and wharfinger's charges, including storage on wharf not exceeding six days, 17 cts. per hhd., 15 cts. per t'ce, 8 cts. per box and 4 cts. per bag, commencing immediately upon delivery from steamer." The vessels on which the sugars were shipped carried general cargoes, and on reaching New York stopped in the first instance at the regular pier of the company in New York, at the foot of Wall street, and there discharged light cargo other than sugar, and thence proceeded, under the option reserved in the bill of lading, to the wharves of the plaintiffs in Brooklyn, and there delivered the sugars. The defendants were ready with lighters to receive the sugars from the vessels, and demanded that they should be delivered directly into the lighters. They were, however, delivered upon the wharf, and not directly into the lighters, for the convenience of the steamers in sorting the defendants' sugars from other goods and sugars on the vessels, the cargoes in most cases including other sugars than the defendants. This action is brought to recover the landing and wharfinger's charges at the rate expressed in the bills of lading.

John E. Parsons for appellants. The bills of lading compelled the vessels to transport the sugar to the port of New York. They required them to deliver the sugar there, within reach of the vessel's tackles, to the consignees. (*N. Y. C. & H. R. R. Co. v. Stand. Oil Co.*, 20 Hun, 39; *Rowland v. Milla*, 2 Hilt. 150; *Goodwin v. B. & O. R. R. Co.*, 58 Barb. 195; *Redmond v. S. S. Co.*, 46 N. Y. 578.) Wharfage,

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in the sense of compensation for the use by a vessel of a pier and for the right to discharge cargo, has always been recognized as the subject of legislation. (Acts of May 6, 1870, April 23, 1872; May 21, 1875; April 16, 1879; *Vanderbilt v. Adams*, 7 Cow. 349; *Com'rs of Pilots v. Clark*, 33 N. Y. 251; *Munn v. State of Ill.*, 4 Otto, 113; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275.) And whether the sugar was delivered on a public or private wharf, the interests of commerce and public policy forbid such a construction of the clause in question as would compel the payment upon foreign consignments, under bills of lading executed abroad, of charges which were of no service to the cargo and were incurred against the protest of the consignees. (*Munn v. Illinois*, 94 U. S. 113, 127, 128.) The plaintiffs cannot recover the disputed charges. (*Pardee v. Treat*, 82 N. Y. 385; *Root v. Wright*, 84 id. 72; *Seward v. Huntington*, 94 id. 104; *Merrill v. Green*, 55 id. 270; *Simson v. Brown*, 68 id. 356.)

Edward H. Hobbs and *S. P. Nash* for respondents. The defendants are liable for the charges specified in the bills of lading, notwithstanding the statute regulating wharfage. (Chap. 254, Laws of 1860; Chap. 320, Laws of 1872; Chap. 405, Laws of 1875; Chap. 315, Laws of 1877; *Munn v. Ill.*, 94 U. S., 127; *Pierpont Dock*, chap. 78, Laws of 1885; *Erie Basin Dock Co.*, chap. 165, Laws of 1864; *Commercial Warehousing Co.*, chap. 378, Laws of 1867; *N. Y. El. Co.*, chap. 826, Laws of 1868.) The wharves and piers in the city of New York are but public streets, and the only right of the lessee or owner is the privilege of collecting wharfage of the vessels making fast to them. (*Com'rs of Pilots v. Clark*, 35 N. Y. 251; *Taylor v. Atlantic Mut. Ins. Co.*, 37 id. 275.) As goods lawfully landed upon a public wharf may encumber and obstruct it for an unreasonable time, the section of the statute allowing a charge upon the goods after twenty-four hours was passed to enable the owners of the wharf to compel the removal of the goods. (Story on Bailments, § 453a.) The statute in question has no application to the owner of a wharf

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who has the right to use it for storage purposes, and who holds himself out as a warehouseman and wharfinger and renders services for and about the goods. (*Wetmore v. At. W. Lead. Co.*, 37 Barb. 70; *Wetmore v. Brooklyn G. Co.*, 42 N. Y. 384.) A bill of lading is in general binding upon and protects all persons who, by means of it, become the owners or custodians of goods. (*Whitworth v. E. R. Co.*, 87 N. Y. 413; *Morse v. Pesant*, 2 Keyes, 16; *S. C.*, 3 Abb. Ct. Abb. Dec. 321; *The Delaware*, 81 U. S. 579.) In the case of a general cargo the different consignments must be properly separated and during the time required for this purpose the carrier's risk continues. (*The Eddy*, 72 U. S. 481.) But the carrier must limit this liability and provide that each parcel shall be at the risk of the consignee as soon as delivered from the ship's tackle; bills of lading containing such a limitation are binding upon the consignee. (*The Santee*, 2 Benedict, 519; *S. C.*, 7 Blatch. 186.)

ANDREWS, J. The defense to this action on the merits, if it has any foundation, rests upon the assertion by the defendants of the right to disregard and repudiate their written contract contained in the bills of lading, to pay landing and wharfinger's fees at the rate specified in the margin of the bills, although the carriers exercised their option to discharge the sugars in Brooklyn. It is manifest that this defense cannot be maintained upon the ordinary and general rules applicable to contracts. The option reserved by the carrier to discharge the sugars in Brooklyn contemplated a delivery upon a wharf in case the option was exercised, as is shown by the notation in the margin of the bills. It is inferable from the agreed facts that the option was reserved by the carrier for their convenience in unloading and assorting cargo. At all events the shippers, by the bills of lading, assented to this mode of delivery, and they had no right to insist that, for their convenience, the sugars should be delivered from the side of the ship. The parties to the contract not only made a special agreement as to the mode of delivery, but they fixed by the same agree-

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ment the amount which the shipper or consignee should pay for landing and wharfinger's charges in case the carriers elected to discharge the sugars in Brooklyn. It is plain that this agreement also was within the general competency of contracting parties and was binding upon the defendants, unless they are freed from liability to perform their contract upon some special ground. It is claimed that, assuming the contract was valid and enforceable between the carriers and the defendants, there was no privity between the plaintiffs and defendants which will support an action by the plaintiffs to recover the stipulated compensation. It is unnecessary to invoke the doctrine of *Lawrence v. Fox* (20 N. Y. 268), in order to support the judgment below, and it is not important to consider whether the doctrine of that case is applicable. The plaintiffs came into possession of the sugars through a delivery by carriers duly authorized by the shippers and consignees to make delivery on such wharf in Brooklyn as the carriers might select, subject to the payment by the consignees of wharfinger's fees at a specified rate. The receipt of the cargo on the wharf was in legal effect a service rendered by the plaintiffs for the defendants, upon the employment of the carriers duly authorized to contract in behalf of the defendants for the service at the rates agreed upon in the bill of lading. The defendants were parties to the bills of lading. The plaintiffs received the goods under the terms expressed therein and thereby became entitled to enforce the contract made for the benefit of such wharfinger as should render the contemplated service. In general a bill of lading is binding upon and protects all persons who by means of or under it become the owners or custodians of the goods. (See *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Morse v. Pesant*, 2 Keyes, 16; *The Delaware*, 14 Wall. 579.)

But the defendants mainly rely for their defense upon the act (Chap. 320 of the Laws of 1873) entitled "An act to amend an act in relation to the rates of wharfage and to regulate piers, wharves, bulk-heads and slips in the cities of New

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York and Brooklyn, passed May sixth, eighteen hundred and seventy." The first section of the act prescribes the rates of wharfage and dockage within the cities of New York and Brooklyn. "Wharfage" is a charge against a vessel for lying at a wharf, and is not a charge for caring for the goods. The plaintiffs are not seeking to recover wharfage, and the first section of the act has, therefore, no direct bearing upon the present controversy. But it is claimed that by the second section the defendants had the right to have the sugars remain on the plaintiffs' wharf for a period not exceeding twenty-four hours without charge. The second section is as follows: "It shall be lawful for the owners or lessees of any pier, wharf or bulk-head within the cities of New York and Brooklyn to charge and collect the sum of five cents per ton on all goods, merchandise and materials remaining on the pier, wharf or bulk-head owned or leased by him for every day after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such pier, wharf or bulk-head, and the same shall be a lien thereon." It will be observed that the section does not in terms prohibit wharfingers from entering into special contracts for the use of their wharves for the storage or deposit of goods thereon during the first twenty-four hours. It simply declares it to be lawful for owners or lessees of wharves or piers to charge the rate specified upon goods remaining thereon more than twenty-four hours. The public wharves in New York and Brooklyn are, in general, extensions of public streets, and the second section of the act may have been enacted for the protection of wharfingers on the public wharves against the annoyance and obstruction which might be occasioned by the accumulation of goods, merchandise and materials thereon, and to furnish a motive to the owner of property for its prompt removal. This view is quite consistent with the course of legislation and the decisions. But however this may be, we think the statute cannot be construed to prohibit the owner of a private wharf from entering into a contract for the landing and

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deposit of goods upon his wharf upon such terms as may be agreed upon between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation. Assuming that such a regulation would be within the competency of the legislature, as to which we express no opinion, nevertheless the intention of the legislature to exercise such an exceptional power cannot be inferred from the language of the act of 1872. The act can have effect without imputing to the legislature the design attributed to it by the defendants. (See *Wetmore v. Brooklyn Gas-Light Co.*, 42 N. Y. 384.)

We think the plaintiffs were entitled to maintain the action and that the judgment should be affirmed.

All concur.

Judgment affirmed.

ALICE LAFFLIN, Respondent, v. THE BUFFALO AND SOUTHWESTERN RAILROAD COMPANY, Appellant.

106	136
112	460
106	136
120	177
106	136
127	52
106	136
142	570

Plaintiff, a passenger on defendant's road, in attempting to step from the car to the station platform missed the platform, fell between it and the car and was injured. In an action to recover damages for the injuries the following facts appeared: The distance between the platform and the car was eleven inches. The lower step of the car was eight inches below the top of the platform, and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from the second step without having hold of the iron railing on either side and without looking to see the station platform. The platform had been used for many years by passengers, and prior to the accident no one had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order or improperly constructed. *Held*, the facts did not justify a verdict for plaintiff; and that a refusal to direct a verdict for defendant was error.

As a general rule where an appliance, machine or structure, not obviously dangerous, has been in daily use for years and has uniformly proved

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adequate, safe and convenient, it may be continued without the imputation of negligence.

It is not the duty of a railroad company to furnish some one to aid passengers in alighting from its cars.

(Argued May 9, 1887: decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 23, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

George C. Greene for appellant. Plaintiff was clearly guilty of contributory negligence. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47, 50; *McGrath v. D. & H. C. Co.*, 14 Week. Dig. 574, *Becht v. Corbin*, 92 N. Y. 658; *Burrows v. E. R. Co.*, 68 id. 556, 559; *Gavett v. Manchester & L. R. R. Co.*, 16 Gray, 499-507; *Ward v. Cent. Park R. R. Co.*, 1 J. & S. 392; *Phillips v. R. & S. R. R. Co.*, 49 N. Y. 177; *Lucas v. N. B. & T. R. R. Co.*, 6 Gray, 64; *Mackey v. N. Y. C. R. R. Co.*, 27 Barb. 529; 2 Redf. on Ry's, 191-195; *Brooks v. B. & N. F. R. R. Co.*, 25 Barb. 600; 27 id. 532; *Willis v. L. I. R. R. Co.*, 32 id. 398-404; affirmed, 34 N. Y. 670; *Baulec v. N. Y. & H. R. R. R. Co.*, 59 id. 366; *Cunningham v. Lyness*, 22 Wis. 236; *Potter v. Chicago & N. Y. Ry. Co.*, 21 id. 372; 9 Am. & Eng. Ry. Cas. 264 n.)

Wm. S. Oliver for respondent. It was defendant's duty to so light its station, or landing place, where it invited passengers to alight, as to enable them to see where they were to step, to avoid danger and secure safety. (*Hulbert v. R. R. Co.*, 40 N. Y. 145; Wharton on Neg., §§ 654, 821; Thompson on Carriers, 108; Sher. & Redf. on Neg., §§ 276, 277, 278; Thompson on Neg., 315.) It was also its duty to hold its train from motion while its passengers were alighting. (*Tabor v. R. R. Co.*, 71 N. Y. 489; *Bartholemew v. R. R. Co.*, 102 id. 716; *Keating v. R. R. Co.*, 49 id. 673; Wharton, §§ 375, 366, 649; Thompson on Carriers, 227; *Cockle v. L. & S. E.*

R. Co., 7 C. P. 321; *Praeger v. R. R. Co.*, 24 L. T. R. [N. S.] 105; *Foy v. R. Co.*, 18 C. B. R. [N. S.] 225; C. L. R., 114.) At night-time depots should be lighted, or other proper means taken so as to enable passengers safely to reach the place of entrance or exit. (Wharton on Neg., § 654; 48 Vt. 10, 32 Wis. 524; 36 id. 410.) A passenger has the right to assume that the company has performed its duty, and that the platform is safe. His going upon it in order to reach the cars is not, therefore, of itself, contributory negligence. (*Ferris v. Union F. Co.*, 36 N. Y. 312; *Hubert v. R. R. Co.*, 40 id. 145, 151; *Weston v. R. R. Co.*, 73 id. 595, *McGuire v. Spence*, 91 id. 303.) Evidence of the size of defendant's ordinary cars was competent and proper evidence to be considered by the jury in determining whether the space between the steps of the defendant's cars and the station platform was too great for safety. (*Sheldon v. R. R. Co.*, 14 N. Y. 218; *Field v. R. R. Co.*, 32 id. 339, *Crist v. R. R. Co.*, 58 id. 638; *A. M. Co. v. Kessler*, 66 id. 637; *Titus v. Ins. Co.*, 81 id. 410-420; *Hunt v. Maybee*, 7 id. 266-273.)

EARL, J. This action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident are as follows: The train in which she was a passenger reached the station at Dayton, in this State, on the 20th day of January, 1880, at eight o'clock in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleges that the space between the platform and the car was too great, and that in consequence thereof, when she stepped off from the car, she failed to reach the platform, and was thus caused to fall. There is no complaint that the platform was out of repair, or that it was improperly constructed. The only complaint is that it was too far from the car. The platform was two and one-half feet higher than

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the top of the iron rail, and about three feet above the top of the ground. The distance between the outer line of the car and the platform was eleven inches. There were three steps at the end of the car, and the lower one was eight inches below the top of the platform and one foot and seven inches from the side thereof. The second step was two feet and two inches from the side of the platform and about four inches lower than the top thereof. The height of the platform of the car above the iron rails was about four feet. The plaintiff passed out of the car on to the car platform and then to the second step, and without having hold of the iron railing on either side and without looking to see the station platform she stepped out, and failing to reach it, fell.

There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary the evidence shows that the platform had been used for many years by men, women and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women and children must have passed from the cars to this platform in entire safety. Under such circumstances how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted. In the case of a platform which had always been safe, and answered its purpose for men, women and children, in all kinds of weather, by night and by day, for

many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient? In the case of *Dougan v. Champlain Transportation Company* (56 N. Y. 1), the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that anyone had ever before gone overboard in that way. And it was held that the plaintiff was properly nonsuited. GROVER, J., writing the opinion said: "It will be seen that the only proof of negligence was the omission to enclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that any one had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur." In *Loftus v. Union Ferry Company* (84 N. Y. 455) the plaintiff's intestate, a child six years old, while leaving one of defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered, and it was held that the verdict was properly set aside. ANDREWS, J., writing the opinion of the court, said: "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If the

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defendant ought to have foreseen that such an accident might happen, or such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years certifying to the sufficiency of the guard. That it was possible for a child, even a man, to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty." In *Burke v. Witherbee* (98 N. Y. 562), while an empty car was descending a mine the hook which fastened it to the cable became detached from the car and it ran down the mine and killed plaintiff's intestate. The judgment for plaintiff was reversed because there was not sufficient proof of actionable negligence on the part of the defendants. The judge writing the opinion said: "In this mine alone, cars drawn by a hook must have made several hundred thousand passages without a single accident. What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or different test could it have been subjected to before a mine owner could use it without the imputation of negligence? It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which, under varying conditions, upon countless occasions uniformly answered its purpose without injury to any one." The application of these authorities to this case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.

On the evening when this accident happened, the evidence

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tends to show that it was dark, and that the platform was not plainly visible. It was somewhat lighted by light which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform, and then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car.

There was some proof that about the time the plaintiff attempted to step from the car upon the platform, there was a slight jerk or jar of the car; but it does not appear that that had anything whatever to do with the accident.

A careful consideration, therefore, of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff. It was a misadventure, and no rule of law will permit her to charge the misfortune, in whole or in part, to the defendant.

The judgment should, therefore, be reversed and a new trial ordered, costs to abide event.

All concur.

Judgment reversed.

JOHN G. AVERY, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Plaintiff was lessee of certain premises, upon which was a hotel, formerly separated from defendant's premises by a strip of land thirty feet wide. This strip, in the deed under which defendant claimed, which was from W., the then owner of the whole property, was described as thereby dedicated for the purposes of a public street; the dedication was never accepted by the public. The deed from W. stated that the conveyance was for the purpose of a railroad depot only,

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106 143
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138 151

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and the grantee erected a depot upon the premises. W., devised the remaining property, one-fourth to each of four devisees. On partition of the hotel property, not including the strip of thirty feet, two of the devisees became the owners. They subsequently quit-claimed to defendant's predecessor an undivided one-half of that portion of the strip in question, twenty feet wide, adjoining the land so conveyed by W. The deeds contained a provision to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed. The hotel was accessible from the depot across said strip, and depended largely for its patronage upon the passengers arriving at and departing from the depot. Defendant, on succeeding to the title of W.'s grantee, built a high and substantial fence the whole length of the strip, on the line between the twenty feet so conveyed and the remaining ten feet, with no opening therein, thus cutting off all passage between the hotel and depot. In an action, among other things, to restrain the continuance of the fence, *held*, that by the failure to accept the dedication, the thirty feet strip remained the property of W., and descended to his devisees at his death; that plaintiff, as lessee of the grantors, could not question the validity of the quit-claim deeds which must be regarded as conveying all the interest of the grantors in the twenty feet, and they thereby abandoned all claim to the same as a public highway; but that the provision in the deeds as to an opening was a covenant running with the land conveyed; that such covenant made the right of passage across the twenty feet a right or easement appurtenant to the hotel property, and so it was enforceable by plaintiff as lessee of such property; and that, therefore, the action was maintainable.

Plaintiff's complaint simply alleged that he was in possession of the hotel property. On trial defendant moved for a dismissal of the complaint on the ground that it did not show plaintiff to be a party or privy to any covenant in the deeds. The court, on motion of plaintiff, permitted an amendment of the complaint setting up the lease to plaintiff.

Held, no error.

The complaint alleged the strip of land in question to be a public highway and the fence for that reason a nuisance. There were, however, averments to the effect that there existed an easement appurtenant to the hotel property, consisting of a right of way across some portion of the strip for passengers and their baggage, and that defendant in erecting the fence had left no opening, as of right it should have done. *Held*, that while the omission to state in the complaint that the easement claimed was reserved by the deeds might have been ground for a motion to make the complaint more definite, it did not defeat plaintiff's

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right to any relief by virtue of the reservation which he could not obtain on any other ground.

The judgment below directed the removal of the whole fence. *Held*, error; that plaintiff was simply entitled to an opening opposite to the hotel of sufficient size to permit the convenient passage of, and at no time to be closed against, passengers and their baggage.

Argued May 10, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made May 9, 1885, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

George C. Greene for appellant. To prove a highway by dedication, three facts must be shown: First, the intention to dedicate; second, an act of dedication; third, the acceptance by the public. (*State v. Greene*, 41 Ia. 693; *Buchanan v. Curtis*, 25 Wis. 99; *Maudersched v. Dubuque*, 29 Ia. 73; *Cook v. Harris*, 61 N. Y. 454.) Without acceptance and ratification by the city of Buffalo, there was no dedication, and the public acquired no rights under the deed; and until acceptance, the offer to dedicate could be withdrawn, or the dedication be revoked. (40 N. Y. 442-450; 19 Johns. 136; 16 Barb. 251; 2 Abb. [N. C.] 386, 395, 397; 14 Barb. 328; 61 N. Y. 454. 66 id. 261-269; 94 id. 16; *Jackson v. Stevens*, 10 Johns. 110-114.) The clause in the deeds of 1857 as to maintaining an opening, is clearly and strictly a condition subsequent. (1 Hilliard on Real Prop. 381, § 26; id. 382, § 27; 2 Abb. [N. C.] 56; *Woodworth v. Payne*, 74 N. Y. 196; 62 id. 592.) Right of re-entry for breach of condition subsequent does not pass by a conveyance of land, and until there is a re-entry by the grantor or his heirs, for the breach, the estate is not forfeited, but remains unimpaired in the grantee, and a mere stranger cannot take advantage of it. (*Towle v. Remsen*, 70 N. Y. 303, 312; *Nicoll v. N. Y. C. & E. R. Co.* 131, 12 id. 134, 135; 22 Wend.

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201; 8 Am. and Eng. R. R. Cases, 734; 63 Mo. 68; 46 Barb. 109; 134 Mass. 82, 85; 70 N. Y. 303, 312.) The plaintiff does not occupy such a relation to the grantor as to enable him to enforce it or maintain an action for the breach. (*Huttemier v. Albro*, 2 Bosw. 546, 556.) If one conveys land in fee simple, and neither excepts any part nor reserves anything to himself out of it, but restricts the grantee to a particular use of the land, this restriction is void, as repugnant to proprietary rights of an owner in fee. (*Craik v. Wells*, 11 N. Y. 315, 322.) An exception or reservation to a third person not a party to the deed is void. (*Craik v. Wells*, 11 N. Y. 323; *Stevens v. Adams*, 1 Sup. Ct. R. [T. & C.] 537, 539; 34 Barb. 566; 24 Hun, 430.)

John Frankenheimer for respondent. Occupancy by the plaintiff, and his use of the premises as a hotel for many years, gave him a cause of action against the defendant for the erection and maintenance of the nuisance. (*Brown v. Brown*, 30 N. Y. 519.) The amendment of the complaint allowed did not introduce a new cause of action, but it tended to justice. (*Fogg v. Edwards*, 20 Hun, 90.) Evidence of the difference in the receipts of the hotel and restaurant in corresponding months, with or without the nuisance there, may not have been admissible definitely to fix the damage, yet it was admissible as one of the means by which the court might arrive at the proper measure of compensation. (*Albert v. Bleecker St. R. R. Co.*, 2 Daly, 389; Wood on Nuisance, § 876; *St. John v. Mayor, etc.*, 13 How. 527.) The court properly held the measure of damages to be the difference in the rental value. (*Weil v. Stewart*, 19 Hun, 272; *Francis v. Schoellkopf*, 53 N. Y. 152; *Jutto v. Hughes*, 67 id. 267.) The facts established beyond question the existence of a right of way over the alley as an easement or appurtenant annexed to the fee of the hotel premises. (*In re Eleventh Ave.*, 81 N. Y. 436; *Child v. Chappell*, 9 id. 246; *Kings Co. F. Ins. Co. v. Stevens*, 87 id. 287; *White's B'k of Buffalo v. Nichols* 64 id. 65; *Wiggins v. McCrary*, 49 id. 346; *Cox v. James*,

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45 id. 557.) Although the lease to the plaintiff is of "the building known as the Continental Hotel," still it carried with it the right to use the alley in the same way that it had always been used, as an appurtenant to the hotel premises. (*Doyle v. Lord*, 64 N. Y. 432; *People v. Gedney*, 10 Hun, 151; *Newcome v. Coulson*, 21 Moak's Eng. R. 851.) The plaintiff being in possession of the right of way as appurtenant to his hotel, it was an unlawful act for the defendant to interrupt his enjoyment of it. (3 Blacks. Com. 241; *McAdam Landl. and Ten.* § 61.) It is evident from the deeds of 1857 that what the parties contemplated was the erection of a depot by the defendant on the strip of twenty feet, and an opening into it for the convenience and benefit of the hotel, which should never be closed against passengers and their baggage. (*Nichols v. Wentworth*, 2 East. R. 910; *Coleman v. Beach*, 97 N. Y. 545.) The language of the deeds of 1857 does not constitute a condition subsequent, but does constitute a covenant. (2 Washb. on R. P. [4th ed.], 2, 6, 7.) Conditions are not favored, and must be clearly expressed. (*Craig v. Wells*, 11 N. Y. 315; *Bridger v. Pierson*, 45 id. 601; *Countryman v. Deck*, 13 Abb. [N. C.], 110. The damages awarded by the court were upon the basis of a diminution of the rental value of the premises by reason of the nuisance, and were proper. (*Francis v. Schoellkopf*, 53 N. Y. 152; *Jutto v. Hughes*, 67 id. 267.)

PECKHAM, J. The plaintiff is lessee of certain premises in Buffalo, which were originally divided from premises of defendant's by a strip of land thirty feet wide and running from east to west 240 feet, and thence north about 100 feet. All of the property once belonged to one James Wadsworth, who, in 1844, granted and conveyed a portion of it to defendant's predecessor for the purpose of a passenger and freight depot, and for no other purpose, and described this above mentioned strip of land thirty feet wide as thereby dedicated for the purpose of a public street.

Some question was made upon the trial as to the right of

defendant to use, for the purpose of a railroad restaurant, any portion of the property thus conveyed; but the court held, under the other facts in the case, that defendant's right to so use it could not now be successfully questioned, and there has been no appeal from such decision and so the question may be dismissed from our consideration.

In 1850, James Wadsworth died leaving a will by which he devised to his children the land not theretofore conveyed to defendant's predecessor, being one-quarter to each of his two sons, and one-quarter to his executors, in trust for his daughter Elizabeth Wadsworth, and one-quarter to his executors in trust for his grandson Martin Brimmer, Jr.

So far as the evidence in the case shows this left the title, not only to the premises leased by the plaintiff, but also to the thirty feet strip of land already mentioned, in the devisees under the will of James Wadsworth, because of the lack of any acceptance of the dedication on the part of the public authorities, which will be again referred to. In 1853 partition of the lands now leased by plaintiff (which lands excluded the thirty feet strip) was made, by which one-half of such premises was conveyed to the trustees of Martin Brimmer, Jr., and one-half to Charles James Murray, who was then an infant. Both conveyances bounded the premises by the line of this thirty feet strip, called therein an "alley." In 1857 the trustees of Brimmer and the general guardian of Murray conveyed by quit-claim deeds to defendant's predecessor an undivided one-half part of that portion of the strip in question, being twenty feet wide and adjoining the lands of the said predecessor theretofore conveyed to it by James Wadsworth in his life-time. This left the title to the remaining ten feet of such strip unaffected, while an undivided half of the interest in the twenty feet just mentioned remained in the other devisees under the will of Wadsworth, assuming that Brimmer's and Murray's trustees and guardian held title to one-quarter each and that it was conveyed to the defendant's predecessor by the deeds above mentioned.

These deeds of the twenty feet contained a provision per-

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mitting the construction of a building thereon at the discretion of the railroad company by a wall along the line bounding on the remaining ten feet, and with roof projecting over such ten feet strip a reasonable width for eaves-trough and water conductor, such projection to be on sufferance of the grantors provided they should want at any time to build on the land.

Both these deeds also contained the following language: "This conveyance is upon the express condition that the said railroad company, their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, so called" (the premises now leased by plaintiff), "adjacent to the premises hereby conveyed, for the convenient access of passengers and their baggage to and from said premises hereby conveyed, which opening shall at no time be closed against such passengers and their baggage, subject, however, to all proper regulations of police and railroad discipline of persons on the said premises."

Subsequent to the execution of these deeds, and in May, 1857, defendant's predecessor executed quit-claim deeds to the trustees of Brimmer above mentioned, and to the general guardian of Murray, of an undivided half of the remaining ten feet of said "alley," although it nowhere appears that such predecessor had any title to such ten feet. By mesne conveyances, in or about September, 1873, Edward R. Hammatt having become trustee for Brimmer, Jr., as such trustee became, and has ever since been, the owner of the premises now leased to plaintiff, which premises are bounded by, and do not include in the conveyances or lease, any portion of the strip of land heretofore spoken of, although plaintiff claims a right of way over the thirty feet strip dedicated for a public street by said James Wadsworth in his deed of January, 1844.

Soon after the execution of the deeds to the railroad company above mentioned, the company laid its tracks along this twenty feet of the thirty feet strip which lies south of the premises leased by plaintiff, and has ever since used the tracks for running its cars into and out of its depot at the

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west end of such strip. It appears also that there has been since the conveyance by Wadsworth in 1844, and upon the premises retained by him, and bounded by this thirty feet strip, a hotel which has been accessible from defendant's depot across its tracks, and which has depended largely for its patronage and custom upon the passengers arriving at and departing from such depot of defendant's, and up to August, 1881, this thirty feet strip (excepting as twenty feet of it were used by defendant's tracks as above stated) has been open and used by the occupants of the hotel and by travelers as above described and by the public. In May, 1887, the said Hammatt, as trustee of Brimmer, leased to plaintiff the hotel spoken of for three years at the annual rent of \$4,000 and the plaintiff entered into possession under such lease, and has been and is now carrying on such hotel and restaurant. The further fact was proved that the right of way across this thirty feet strip is beneficial to the hotel and restaurant, and to the plaintiff's possession, and is an appurtenance thereto of great value.

In August, 1881, the defendant entered upon the said strip or alley and built a high and substantial fence the whole length of the strip and on the edge of the twenty feet bordering on the remaining ten feet thereof, and such fence has been kept closed against the plaintiff and all others, and the defendants have thus wholly excluded the plaintiff, his servants, the guests of the hotel and all others from entering upon such twenty feet. The fence is thus a total obstruction in the way of any passage across such twenty feet to all persons coming from the depot to the hotel, or from the hotel to the depot who might otherwise reach either place by traveling over this twenty feet, and in this way such obstruction has very greatly lessened the patronage of the hotel, and damaged thereby the plaintiff up to the commencement of this action in the sum of \$300 as found by the trial judge.

This action was brought to enjoin the continuance of such fence and to recover damages for the time which it had stood. The complaint contained two counts, the first one stating the

facts of the conveyance to defendant's predecessor and the dedication of the strip as a public street and that the parties to the conveyance agreed mutually that the strip should remain and be a public street, and that it was necessary for the proper enjoyment of the hotel and restaurant that this strip should remain a public street. The plaintiff then set forth the erection of the fence, and thus, as he said, defendants wrongfully excluded him from the public street; and he further alleged that such fence was a nuisance.

In the second count the strip was called an *alley* or public highway, and the plaintiff claimed to have an easement or right of way or access across or to the twenty feet strip in question. The plaintiff also alleged (evidently with reference to the language of the deeds to the railroad company in 1857) that the defendant had not since the erection of the fence maintained an opening into that part of the alley appurtenant to the southerly side of said hotel for the convenient access of passengers and their baggage "to and from the alley or public highway as of right it should have done and was bound to do," and that it had thereby deprived passengers and their baggage of convenient access to said alley or public highway and thus prevented such passengers and their baggage from entering said hotel at all across or by means of said alley or public highway. The plaintiff then alleged the tracks and the fence to be a nuisance and asked for an injunction restraining defendant from continuing to permit its tracks to remain in the public street or alley, or from continuing the fence, etc. The answer of defendants was substantially a general denial.

When the case came on for trial the counsel for the defendant moved to dismiss the complaint, because, so far as the complaint therein showed, the plaintiff was an entire stranger to the whole matter, as the only allegation on that subject was that he was in possession of the premises and he did not appear as party or privy to any covenant or provision whatever. The plaintiff then moved to amend by, in effect setting up his lease from the owner, to which defendant's counsel objected, that the amendment was not such an one as could be

made upon the trial, and that it set up a new and distinct cause of action and one which was on contract or covenant and which could not be joined with an action for damages for a nuisance. The objections were overruled and the trial proceeded. The facts, heretofore stated, were found by the judge who tried the cause, without a jury, and a judgment was decreed enjoining the continuance of the fence and providing for its removal, and for the recovery of the damages sustained by plaintiff, being the sum of \$300. The General Term affirmed the judgment and the defendants appealed to this court.

We think the amendment allowed by the court was a proper exercise of discretion. It was in no sense the introduction of a new cause of action. Upon defendant's own objection, and assuming it to be well founded, the cause of action in the complaint was defectively stated, because it showed no right or interest on the part of plaintiff to take advantage of the rights, if there were any, of the owner of the premises known as the hotel property. For the purpose of obviating that objection and to show that the plaintiff had the same rights in the property, so far as to take advantage of the covenants in regard to it which its owner had, the allegation of the lease was added to the other allegations in the complaint.

The defendant's counsel now claims that it appears, from the uncontradicted facts, that there never was any public street over or on this thirty feet strip, because there never was any acceptance of the dedication on the part of the city authorities or any control over it ever assumed by them. He further argues that the plaintiff under the pleadings is not entitled to any relief, for the reason that his rights are therein based upon the alleged fact of the strip being a public street, and when that fact fails, his rights fail with it. The concession that there was no public street must be made, and for the reasons stated. It must also be conceded that the plaintiff does, in his complaint allege, especially in his first count, that this strip is a public street or highway, and he alleges the fence to be a nuisance for that reason. In the second count, however, we think there are facts enough alleged, especially

when the question does not appear to have been very clearly raised before, upon which can be spelled out the assertion of a right on the part of the plaintiff to have access to, and to some extent a right of way over this strip, even if it be not to all intents and purposes a public highway. In the second count the plaintiff speaks of there being as appurtenant to the hotel an easement which he describes, it is true, by metes and bounds, but which a reading of the whole count enables one to say is the allegation of an easement consisting of a right of way over or access to some portion of this strip of land for passengers and their baggage, and that the defendants having erected the fence had left no opening therein at certain places which were appurtenant to the southerly side of said hotel, which of right the defendant should have done.

This is clearly a claim founded, not upon the fact that this strip was a highway and that as such any obstruction thereof was illegal, but it is a claim founded upon a totally different basis — a claim of a right to an opening into the alley appurtenant to the southerly side of the hotel, and for the convenient access of passengers and their baggage; and it was a statement that, by erecting this fence, the defendant has violated that right, and has thereby prevented such passengers and their baggage from entering said hotel, to plaintiff's damage. All that was lacking in this language to show exactly what fact the claim was founded upon, was the statement that the right of way was reserved by the deeds of Wadsworth, as trustee and guardian, executed in 1857. It might have been ground for a motion to make the complaint more definite and certain, but the claim is obviously not based upon rights arising solely from the assumption that the strip of land was, at all events, a public highway. If the plaintiff is, therefore, entitled to any relief on this branch of the case by virtue of the reservation in those deeds, and which he could obtain on no other ground, I think it should be granted him now, instead of reversing the judgment because the plaintiff's right to relief was not clearly and accurately stated, the result of which would be an application to amend the

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complaint and then going to trial and thus incurring great and in this case useless expense.

By the failure to accept the dedication, the thirty feet in question remained the property of Wadsworth, and descended to his devisees at his death. By the deeds of the trustees of Brimmer and the guardian of Murray, all the estate of Brimmer and Murray in the twenty feet of the strip in question was conveyed to the railroad company. Such interest was said to be the equal undivided one-half part of such portion. But whatever it was, up to that amount, such estate was conveyed to the company. The title of Murray to about one-half of the property upon which the hotel stands, and which was bounded upon the said strip, was subsequently conveyed to the trustee of Brimmer who is the lessor of the plaintiff. Whatever rights, therefore, which the other devisees under the will of James Wadsworth may have in this twenty feet of the original thirty feet strip, as tenants in common with the company, about which we say nothing, as nothing is required to be said in this case, it is clear that the present plaintiff, who claims as lessee of the lessor who executed these deeds of 1857 to the railroad company, cannot raise the question of their invalidity to convey the interest of the *cestui que trust* and infant Brimmer and Murray. They must be regarded as valid deeds and as conveying all the interests of Brimmer and Murray in this twenty feet to the railroad company, and such grantors must be regarded as thereby abandoning all claim to the same as a public street or highway. They are no longer tenants in common with anyone.

The sole remaining question, therefore, is, what rights, if any, were reserved to Brimmer and Murray by those deeds of 1857? The grantors, in those deeds, contemplated the possible, if not probable, erection of a building over this twenty feet, showing thereby a clear intent to abandon all pretense of a claim for its use as a public street or highway, even if such abandonment were not otherwise conclusively shown by the execution of the deeds.

But the deeds contained, in addition, language providing

for an opening and access to this twenty feet, which language has already been quoted, and the plaintiff claims that if the deeds are valid this language, under all the circumstances, must be construed to be a covenant and the burden thereof as running with the land conveyed and in favor of those having a legal interest in the hotel lands, and that such covenant makes the right of access and transit to and across this twenty feet a right or easement appurtenant to the hotel premises. On the other hand, the defendants claim that the language used makes a condition subsequent, which cannot be taken advantage of by any but the grantor and his heirs.

We incline to the construction contended for by the plaintiff. The fact that the deed uses the language "upon condition," when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. The question is always what was the intention of the parties, and while such intention is to be gathered from the language used, yet its construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings.

From the language of the first deed from Wadsworth to defendant's predecessor, in which the land is conveyed to it for the purpose of a passenger and freight depot only, taken in connection with the fact of the existence of a hotel and restaurant at that time on the land retained by him, and looking at the further fact that from 1844 to 1857 this strip in question had been kept open, and full access to the depot and the hotel on Wadsworth's property was had over this strip by passengers, guests, and the public in general, and that the patronage of the hotel was largely dependent upon the traveling public coming to and departing from said depot—all these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the hotel property, and was not meant to create a condition

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subsequent, which courts regard with no very friendly eye, upon a failure to perform which the estate was to be forfeited, and which none but the grantor or his heirs could take advantage of. It was intended to be an agreement or covenant between the parties running with the land, providing for this access or right of way so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage. (See *Stanley v. Colt*, 5 Wall. 119; *Countryman v. Deck*, 13 Abb. N. C. 110.)

Courts frequently, in arriving at the meaning of the words in a written instrument, construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damage can be recovered. (See Hilliard on Real Property [4th ed.], page 526, § 13; 2 Washburn on Real Property [3d ed.], chap. 14, subd. 3, page 3, *et seq.*) It is asserted, however, that if this language be treated as a covenant, still the plaintiff cannot take advantage of it, as he is not a party or privy to it.

The grantors in these deeds were also the owners of the hotel property, and the easement provided for in the deeds for the transit of passengers and their baggage over this twenty feet must be construed as reserved, not for the benefit of such passengers in any sense, but as an easement reserved for the benefit and in favor of the grantors being owners of the remaining hotel property, and as appurtenant to it, and fairly necessary for its full and proper enjoyment. It, therefore, runs with the hotel property and in favor of its owner or lessee, the latter of whom has such an interest in its existence as courts will recognize and protect.

As the rights of the plaintiff are, in our view, dependent upon the deeds of 1857, the judgment must be in accordance with their terms. The courts below erred in not limiting the relief granted to plaintiff by the language of such deeds. As the judgment provided for a full and entire destruction of the fence in question, it must be reversed and a new trial ordered, or else it must be modified so as to provide for an opening

into the strip through that or any other fence or obstruction, of a size reasonable, proper and fit, which shall be opposite to the hotel and adjacent to the premises conveyed by the deeds, and large enough for the convenient access of passengers and their baggage to and from the said strip, which opening must at no time be closed against such passengers and their baggage, and which access must be subject to all proper regulations of police and railroad discipline of persons on the said premises.

We shall order a reversal of the judgment, although a modification as above stated could be easily provided for, unless the plaintiff consents to waive the damages he recovered in the courts below. We do this because we are greatly dissatisfied with the evidence upon which the recovery as to the damages was based. It was exceedingly vague and loose, if not to some extent, guess work. It seems, also, to have been made to some extent at least upon a mistaken view as to the defendant's rights and liabilities under its deeds from Wadsworth to the trustee and guardian. Evidence seems, also, to have been offered and received upon the assumption of the right of the plaintiff to a totally unobstructed access to and transit across this whole thirty feet in controversy at all times, ignoring the limitations of the right as contained in the deeds of 1857 to the railroad company. Some portion of the damages may also have been awarded on account of the restaurant in defendants' depot and its consequent effect upon the patronage of plaintiff's restaurant, and upon the rental value of plaintiff's hotel, which the learned judge thought, after all, was the criterion for the damages sustained by plaintiff.

Under these circumstances we are disposed to order a new trial for the errors as to the general rights of the parties contained in the judgment appealed from, so that upon a new trial with those rights plainly defined, the evidence on the subject of damages may be more direct and confined within smaller limits than it was on the trial. This reversal, however, may be avoided in the discretion of the plaintiff by his consenting to waive the damages. If the plaintiff choose, he may consent to waive and remit his recovery for the past

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damages which he alleges he has sustained, and, in that case, we will then modify and affirm the judgment as modified in accordance with this opinion, and after striking out the amount recovered for damages.

The order will, therefore, be that the judgment of the court below is reversed, and a new trial granted, unless plaintiff stipulates to waive the damages contained in such judgment, in which case the judgment will be modified as already stated in this opinion, and, as modified, affirmed without costs to either party in this court.

All concur.

Ordered accordingly.

EPHRAIM DRUCKER, Respondent, v. THE MANHATTAN RAILWAY
COMPANY et al., Appellants.

Where an action to recover damages for an alleged interference with plaintiff's rights in a street was tried upon the theory that plaintiff owned the fee to the center of the street, or an easement therein, and no question was raised by defendant in reference thereto on the trial, *held*, that no such question could be raised upon appeal.

The alleged interference was by the construction upon the street and operation of an elevated railroad. *Held*, that evidence was competent that since the building of the railroad the trade and business of the street had fallen off and the amount of custom greatly diminished in volume and changed in character; that to measure and appreciate the individual loss to plaintiff the nature and extent of the general injury was properly and necessarily considered.

The evidence tended to show that by reason of the falling off of business rental values on the street had seriously diminished, but it was also established that the result was due in part to a tendency of business to move "up town." *Held*, that although it could not be ascertained with definiteness and precision what proportion of the loss was caused by the wrongful acts of defendant, and the problem of damages could only be solved by taking into view the general loss and estimating out of it the part or share chargeable to defendant, this did not prevent a recovery; that when all reasonable facts and *data* had been furnished for consideration it was no defense to a wrong-doer that the judgment against him must involve more or less of estimate and opinion.

106	157
118	626
106	157
121	530
106	157
125	187
106	157
128	497
128	507
129	85
129	271
106	157
130	527
106	157
137	180

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Also, *held*, it was proper to prove and to take into consideration as elements of damages the impairment of plaintiff's easement of air, caused by smoke, gases, ashes and cinders from passing trains, the lessening of the easement of light, caused by the elevated road itself and the passage of trains, and the interference with convenience of access, caused by the drippings of oil and water.

(Submitted May 10, 1887; decided June 7, 1887.)

APPEALS from judgment of the General Term of the Superior Court of the city of New York, made March 5, 1885, which affirmed separate judgments against defendants, entered upon a verdict and affirmed orders denying motions for a new trial. (Reported below, 19 J. & S. 429.)

The action was for damages from the alleged impairment of plaintiff's easement of light, air and access appurtenant to his land on Division street, in the city of New York, by the construction and maintenance of an elevated railway, in front of the land and along the street, by defendant, the Metropolitan Elevated Railway Company, and by the maintenance of the same by defendant, the Manhattan Railway Company, the lessee of the former company.

The judge charged the jury that the plaintiff could only recover the diminution of the rental value of his lands caused by the wrongful acts of the defendants as shown by the testimony. He charged that they should find to what extent, if any, the structure itself had caused a diminution; and, further, "that if you find the use of the railway, and its emission of smoke, gas, and the flickering caused by passing trains, also are a use inconsistent with the legitimate use of the public street, and that by reason of that use the rental value of plaintiff's property has been seriously damaged, and that that use and that erection were the only cause of that damage, and you will then find for the plaintiff or the amount that you think that damage was." He, in effect, charged the jury also that the plaintiff's recovery must be confined to the effects of such impairment of the easement of air, light and access as the testimony proved.

The plaintiff was allowed, under an exception, to ask a wit-

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ness: "What, in your opinion, would have been the fair rental value of this property immediately after the construction and operation of this road there?" The defendant objected to the question so far as it called for the effect of the operation of the road, on the ground that the plaintiff was entitled to recover only for the injury caused by the interference to light, access and air, but nothing for the noise, smoke, smell or any of the inconveniences from the running of the road.

A witness, who had testified that rents began to fall off in the neighborhood of the place in question about a certain time, was then asked: "When did the diminution in the volume of business there commence?" This was objected to on the ground that the falling off of the volume of business is not an element of damage. The objection was overruled. To a question to another witness: "What effect, if any, has it had upon the business of that street; what effect has the road had on the business of the street, if any?" the objection was taken to his stating the effect on the business and on the ground that the inquiry should be as to the effect on values. The question was allowed and the witness answered that customers did not come there any more as they had on account of the smoke, dirt, cinders and noise, etc. Other witnesses testified to the rental value of the premises before and after construction and operation of the railroad.

It appeared that the diminution in rental values was caused partially by the general flow of business "up town." Defendants objected and excepted to a recovery for more than nominal damages.

Julien T. Davies, Edward S. Rapallo and Charles A. Gardiner for appellants. The legislature may authorize the construction of works of a public nature, such as railroads, without requiring compensation to be made to persons who may suffer damages occasioned by the construction or operation of such works, in case no property of such persons be actually taken or appropriated. (*Gould v. H. R. R. Co.*, 2 Seld. 522; *Radeliff's Exrs. v. Mayor, etc., of B.*, 4 N. Y. 195;

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Taylor v. Met., etc., Ry. Co., 18 J. and S. 311.) The legislative permission exempts the railroad from all liability to individuals for any public injury. (*Wager v. Troy U. R. R. Co.*, 25 N. Y. 526.) The immediate, and not the remote cause, is to be considered in determining the point of legal liability for damage. (*People v. Mayor, etc.*, 5 Lans. 524.) The loss of customers is not a proper element of damage. (*Squier v. Gould*, 14 Wend. 159.) No account is to be taken of the general benefit to the land owner, resulting from the building of the road. (*C. R. R. Co. v. Bull*, 5 O. St. 568; *L. M. R. R. Co. v. Collet*, 6 id. 182; *State v. Miller*, 3 Zab. [N. J.] 383.) In estimating the damage to land from the construction of a railroad, the injury to other property similarly situated, cannot be shown. (*S. R. Co. v. Knapp*, 42 Ala. 480.) In an action for obstructing a highway the plaintiff could not recover at common law, his damage not being peculiar to himself, but common to all. (*Rickett v. Met. R. R. Co.*, L. R. [2 H. of L. App. Cas.] 167.) No damage can be recovered for loss of air, light or access, where substantial injury is not proved to have been sustained. (Goddard's Law of Easements [Bennett's Ed.], 397; *Dent v. Anden M. Co.*, L. R. [2 Eq.] 244.) Injuries of indefinite amount not capable of estimate do not fall within the constitutional provision against taking property without compensation. (*Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 196; *Pottstown Gas Co. v. Murphy*, 39 Penn. 257; *Searles v. Man. Ry. Co.*, 101 N. Y. 661.)

Roger Foster for respondent. The plaintiff had a good cause of action. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *Wagner v. Met. El. R. R. Co.*, id. 665.) The correct measure of damages was awarded plaintiff. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97, 103; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *Blesch v. C. & N. W. Ry. Co.*, 43 Wis. 183, 195.) No objection can be raised to the description of the plaintiff's claim as for damages for use and occupation. (*U. S. v. Gt. F. Manufg. Co.*, 112 U. S. 645.) The

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defendants' contention that the damage caused by their acts was not proven with sufficient mathematical precision, is untenable. (80 N. Y. 614; *Taylor's Case*, 18 J. & S. 311; *In re U., etc., R. R. Co.*, 56 Barb. 456; 1 Sutherland on Damages, 121; *B. & P. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317, 335; *Blesch v. Ch. & N. W. R. Co.*, 43 Wis. 183, 195; *Steers v. C. of Brooklyn*, 101 N. Y. 51; *Wakeman v. W. & W. Mfg. Co.*, id. 205, 209.) The Metropolitan company was liable for all the damage sustained, and the Manhattan company jointly with it for so much as accrued after the lease to it. (*Taylor v. Met. El. Ry. Co.*, 18 J. & S. 311; *Irvine v. Wood*, 51 N. Y. 224; *Che., etc., Br'dg Co. v. Lewis*, 63 Barb. 112; *Brigg v. Hilton*, 99 N. Y. 517, 531; *Warner v. N. Y. C. R. R. Co.*, 52 id. 437; *Tinson v. Welch*, 51 id. 244; *Pitcher v. Bailey*, 8 East 171; *Booth v. Hodgson*, 6 T. R. [D. & E.] 405; Buller's *Nisi Prius*, chap. 7, p. 326; *Smith v. Brampton*, 2 Salk. 644; *Edmonson v. Machell*, 2 T. R. 4; *Wilkinson v. Payne*, 4 id. 468; Graham & Waterbury on New Trials, chap. 14, subd. 10; *Farwell v. Chaffey*, 1 Burr. 54.) Evidence of the effect of the railroad upon the business in Division street was properly admitted. (Abbott's Trial Evidence; *Givens v. Van Studdiford*, 4 Mo. App. 498, 503; Sutherland on Damages, 419, 420; Mills on Eminent Dom., § 173; *Whitney v. Boston*, 98 Mass. 312; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Kemper v. Louisville*, 14 Bush [Ky.] 87, 96.) The acts of the defendants, even if performed upon the ground owned by them, constitute an invasion of the plaintiff's property in his land. (*Abendroth v. Man. Ry. Co.*, 20 J. & S. 274; 90 N. Y. 122, 173, 176.)

FINCH, J. This case was tried upon the assumption that plaintiff owned the fee to the center of Division street; or, if not, that he had in it, as abutting owner, an easement of light, air and convenience of access. The point now made, that plaintiff did not own the fee because Division street was not shown to be identical with that laid out by Rutgers and

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De Lancey, and was not the owner of an easement because the title to the street, presumptively from its age, came to the city from a Dutch ground brief or an English grant, and was an absolute fee, unclouded by any trust, was not taken upon the trial, either by objection to evidence, or a motion for a nonsuit, or by requests to charge or exceptions to the charge as made. It seems to have been conceded all through the trial that plaintiff had either a fee or an easement in the street, and that for the purposes of the action it was immaterial which, and so the litigation was confined to the question of damages and its true measure. It is too late now to raise or discuss in the case the point suggested. If it had been raised on the trial the identity of the street with that of Rutgers and De Lancey might have been more clearly shown, or the facts of its origin accurately developed.

The further questions raised respected the proof of damages. The action shaped itself into one of trespass for the occupation and impairment of plaintiff's easement for the period beginning with the construction of the road and ending with the commencement of the suit. In the case of *Lahr v. The Metropolitan Elevated Railway Company* (104 N. Y. 268), three out of five members of the court voting in the case put the rule of damages upon the proposition that the road and its operation imposed upon the street an unauthorized use, and were illegal and wholly a trespass as against abutting owners not duly compensated. As a logical consequence the majority held that the damages recoverable included whatever of injury or inconvenience resulted from the structure itself, or were incidental to its use. This rule opened the door to proof of every injury traceable to the road or its operation, and was said to be that "however the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass, rendering the wrong-doer liable for the consequences of his acts." Under that rule none of the evidence offered was inadmissible, for it all tended to show how far and in what manner the plaintiff had been injured by the trespass. But the then minority of the

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court favored a narrower rule of damages. Yielding, as in duty bound, to the authority of the *Story Case*, they admitted that so far as the road, by its construction or use, took or destroyed or impaired the abutter's easement of light, air and access, it was a trespasser, but maintained that beyond that, and for consequential damages which did not touch the easement or invade its enjoyment, it was not a trespasser, but stood under the protection of the general rule freeing it from liability for any incidental injury or annoyance resulting from its careful and lawful operation. But even that restricted rule, which has not as yet received the sanction of the court, appears not to have been violated upon the trial of this action. The judge charged "that nothing is recoverable except for interference with and occupation of plaintiff's light, air and access;" that no damages could be recovered for negligence in the construction or operation of the road since no such cause of action was pleaded, and that it made no difference in the measure of damages that the defendant had not acquired title by condemnation proceedings. The appellant does not complain of this charge, or the measure of damages applied, but does complain that evidence was admitted going quite beyond its boundaries. We are of a different opinion.

Objection was made to the proof that since the building of the elevated road the trade and business of Division street had fallen off, and the current of custom had largely lessened in volume and changed in character, and upon the ground that injury to the plaintiff and not to his neighbors was alone material. But to measure and appreciate that individual loss, the nature and extent of the general injury was necessarily to be considered. To ascertain how much the plaintiff was harmed by the impairment of his easement required a survey of the general facts, and a deduction from them of the particular and special damage to be estimated. The evidence tended to show that, by reason of the falling off of business, rental values on the street had seriously diminished, but also established that this result was due in part to a tendency of business to move "up town," with which the elevated roads

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had nothing to do. How much of the diminution of rental values was due to the construction and operation of the elevated roads, and what part of that portion was caused by the impairment of plaintiff's easement, was the problem of damages, and could only be solved by taking into view the general loss and its nature and extent, and then estimating out of it the part or share suffered by the plaintiff from the taking or impairment of his easement.

But that, it is said, could not be done with any certainty or precision, and left the jury to guess and speculate in reaching a result. It is often the case that damages cannot be estimated with precision and the basis of accurate calculation is wanting and inadequate. That is notably true in many cases of personal injuries. Such evidence as can be given should be given, and facts naturally tending to elucidate the extent of loss should not be withheld. But when all the proof which, in the nature of the case is fairly possible has been given, the good sense of a jury must provide the answer, and it is no defense that such judgment involves more or less of estimate and opinion having very little to guide it. That criticism has no force in the mouth of the wrong-doer when all reasonable data have been furnished for consideration. If we inquire further into the details of the injury suffered we shall find that no proof was objected to which should have been rejected even under the narrower and more restricted rule above suggested. Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water and possibly the frequent columns interfere with convenience of access. These are elements of damage even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the land owners' easement, and to that extent, at least, are subjects for redress in an action for damages. There remains but the annoyance of noise and vibration of the buildings, among the specific injuries mentioned on the trial. But no objection or exception selected these out as improper

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elements in the proof of damage, and the question which might involve the difference of opinion among us is not here presented.

The judgment should be affirmed, with costs.

All concur, except RAPALLO and PROKHAM, JJ., not voting.
Judgment affirmed.

ELIZABETH GRIFFITHS, Respondent, v. EDWARD A. MORRISON
et al., Appellants.

Plaintiff being the owner of two lots, Nos. 141 and 143, each twenty-two feet wide, on a street in the city of New York, sold and conveyed to defendants' grantor lot 143 by metes and bounds "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging." Lot 141 adjoined lot 143 on the east. On the rear of lot 143, at the time of the conveyance, was a house, the front and rear walls of which extended five feet over on lot 141 to the western wall of a building on that lot; they were not keyed into such western wall and the timbers of the house were not supported thereby but rested on piers, the eastern rooms of the house had this wall for their eastern boundary and the plastering was placed upon or directly against it. In an action of ejectment to recover possession of the five feet so occupied, *held*, that the deed did not convey the land in dispute, but only so much of the building as was on the lot described; nor did it give the grantee, as an easement appurtenant to the grant, a right to retain possession thereof and to use the said exterior wall so long as it endured as a wall to his house. and that, therefore, plaintiff was entitled to recover.

There were also a privy, hydrant, etc., on lot 141, connected with the said house on lot 143. *Held*, that the grantee acquired no easement for the maintenance thereof.

By the word "appurtenances" incorporeal easements or rights or privileges will alone pass; and of these only such as are necessary to the proper enjoyment of the estate granted.

Rogers v. Sinsheimer (50 N. Y. 646) distinguished.

(Argued May 10, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment

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in favor of the plaintiff entered upon a verdict. (Reported below, 36 Hun, 337.)

This was an action of ejectment.

It appeared that James Wakely was formerly the owner of two lots of land in the city of New York, known as Nos. 141 and 143 West Forty-ninth street. These lots were each twenty-two feet front and rear, and one hundred feet four and one-half inches in depth. Mr. Wakely conveyed them to the plaintiff by deed, dated November, 1853. By deed, dated June, 1880, the plaintiff conveyed to Mary Larkin, afterwards Laverick, the lot and premises 143, and the latter by deed, dated April 1, 1882, conveyed the same premises to the defendant Morrison. In the deed from the plaintiff to Larkin the lot was described as twenty-two feet front and rear by one hundred feet and four and one-half inches in depth, and was conveyed "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging." It appears that there was a small structure built upon the rear of lot 141, which was complete, walls and all, before a kindred structure was erected upon the rear of lot 143. The structure upon the rear of 141 did not cover the whole lot. The structure upon 143 covered not only the rear of that lot, but extended about five feet over the line of lot 141 and up to the west wall of the structure erected upon 141, and the west wall of 141 therefore formed the easterly wall of the structure upon 143. The walls of the structure of 143, although they extended to the westerly wall of 141, were not keyed to it, and the beams rested on piers. The principal controversy was as to the right of the defendant under his deed to occupy the five feet of lot 141, over which the structure upon 143 extends. Upon lot 141, between the west wall of the building thereon and lot 143, at the time of the conveyance by plaintiff aforesaid, was a privy, hydrant, etc., connected with and used by the occupants of said house on lot 143. Defendant claimed an easement for the maintenance of said structures.

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James J. Thomson for appellants. On the severance by respondent of the tenements 141 and 143, the right to maintain the walls of the rear house, and also the use of the yard as conveyed, passed to her grantee, and thus an easement in favor of the tenement granted was created, and the tenement retained by the respondent became charged with the servitude. This easement was appurtenant to the respondent's grant. (*Rogers v. Sinsheimer*, 50 N. Y. 646; *Lampman v. Milk*, 21 id. 506; *Broom's Maxims* Marg. 476.) This right to maintain and enjoy the exterior walls of the house carries with it the right to occupy the space between the boundary of the lot and the exterior wall of the building. (*Rogers v. Sinsheimer*, 50 N. Y. 648.) This easement in the land and in the cottage wall to serve as an exterior wall continues "so long as the wall shall stand." (*Rogers v. Sinsheimer*, 50 N. Y. 648; *Reiners v. Young*, 38 Hun, 335.) The appellants have an easement in the yard for the use of the tenants of the granted house, and for the maintenance of the privy, a water-closet, hydrant-leader, etc. (*Doyle v. Lord*, 64 N. Y. 437.) The easement in question is not only created by grant, but it is an apparent and continuous easement, and would pass as incident to the grant without the word "appurtenances." (*Parker v. Johnson*, 68 N. Y. 66; *Rogers v. Sinsheimer*, 50 id. 648.) The action for the possession could not be maintained; the appellants enjoy an easement in the land in dispute wholly inconsistent with actual occupation by respondent. (*Wicklow v. Lane*, 37 Barb, 247; *Rogers v. Sinsheimer*, 50 N. Y. 649.)

S. Jones for respondent. The defendant has no rights of easement. (*Grant v. Close*, 17 Mass. 141; *Parsons v. Johnson*, 68 N. Y. 62-70.) There is no actual necessity of these walls for the support of the remaining structure. Actual necessity is the controlling element. (*Ogden v. Jennings*, 62 N. Y. 526-531.)

PECKHAM, J. The deed from plaintiff to defendants' grantor conveyed the lot No. 143 by metes and bounds, as being twenty-

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two feet wide on Forty-ninth street, and the same width in the rear, and 100 feet and four and one-half inches deep. This description confessedly does not embrace the five feet of land in question which are within the area of lot No. 141 on the east. The defendant, however, claims to have the right, in the nature of an easement, to retain the possession of this strip, although not embraced in the above description, because the house on the rear of his lot was built and extended over these five feet on the lot adjoining it on the east, by the person who was at the time the owner of both lots. For this house thus extended towards the east there never was a separate and exterior eastern wall, but its front and rear walls were simply extended five feet over the line until they met the western wall of a house built on that adjoining lot but not up to the western line of the lot within the said limit of five feet and some inches. The front and rear walls above mentioned were not keyed into this western exterior wall, and the timbers of the the house did not rest in such wall but were supported by piers. This wall was thus made the east wall of the house, the largest part of which was built on the lot now owned by defendant, and the plastering was placed upon or directly against it. The house had a hall-way through its center with rooms on each side, and the eastern rooms, of course, had this wall for their eastern boundary. Under these circumstances the plaintiff sold to defendants' grantor a piece of land described as above, "with the buildings and improvements thereon, together with all and singular the tenements, hereditaments and appurtenances thereto belonging."

Unless the defendant has the right to retain the possession of the five feet and the right to use the exterior wall above described as a wall to his building so long as the wall shall endure, the plaintiff has established her right to the premises, and the judgment awarding her possession thereof, must be affirmed.

The defendant claims to have established his right under the language of the deed last above quoted.

The description in the deed of the amount of the land conveyed is minute and definite, even to a half inch, and the

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deed conveys "the buildings and improvements thereon." Does this language include the right to retain possession of this five feet in controversy while that western extension wall endures, and to use such wall as the eastern extension wall of the defendant's house? It is the building and improvements *on the land* which is most accurately and minutely described, that are conveyed. There is no suggestion of mistake of measurement in the amount of land intended to be conveyed, and yet a piece of land, five feet in addition to that which was actually conveyed and out of a total of only twenty-two feet, is thus called for to furnish this easement to defendant's premises. We think that the language conveys only that part of the building which is on the land described and that no right, such as is claimed by the defendant, exists upon or in relation to the land not conveyed and which belongs to plaintiff. Such we think is the clear intention to be deduced from the language used and from the situation of the parties. The defendant can easily build up a wall on the easterly side of his premises which will then keep the building thereon in good condition, although the effect, of course, will be to somewhat diminish the size of the whole building as to width. The defendant will still have all that was conveyed to his grantor, viz., the building and improvements which were on the land actually conveyed.

But the defendant claims that his right can be founded upon the other clause of the deed which conveys the land thus specifically described, "together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining." It is claimed that this right to use the western extension wall as long as it endures, and also the space for the front and rear walls, is an easement which is appurtenant to the grant of the twenty-two feet of land "with the buildings and improvements thereon," which building defendant says cannot exist as a building unless the front and rear walls are permitted to stand, and they cannot stand unless permitted to occupy the land on which they stand.

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It must be remembered that the parties have respectively granted and received all of the land that was intended. There has been no mistake made about the quantity thereof. The grantee received and the grantor conveyed only twenty-two feet in width. Each of course knowing that five feet of the width of the building ran over and upon land not conveyed. If there had been any thought of conveying that portion of the house which stood on land not conveyed, or of erecting any easement upon the land not conveyed in the nature of a right of support for the walls of the building, I think language would have been used which would have made it plain that such was the intention. By the word "appurtenances" incorporeal easements or rights or privileges will alone pass and of these only such as are necessary to the proper enjoyment of the estate granted. (*Ogden v. Jennings*, 62 N. Y. 526.)

I think the estate granted was a lot of land twenty-two feet wide and such building as was on that lot, but the estate did not extend to any portion of that building which was outside of and beyond such lot. It was not necessary in order to enjoy the estate granted, that there should exist an easement in the shape of an appurtenance to such estate, which was not directly necessary to its proper enjoyment and was no more than a mere convenience, and in effect simply an enlargement of the grant. By building the extension wall on his own land the defendant can have the full enjoyment of everything that has been conveyed to him.

He cites as the main authority for his contention the case of *Rogers v. Sinsheimer* (50 N. Y. 646). But the cases are clearly distinguishable. In the *Rogers Case* the original owner had built two houses on two lots with a party wall eight inches thick between them which served as a support for the beams of each house. On the same day he sold the houses by two deeds to two different parties, conveying the easterly lot to A., the plaintiff's grantor, and the westerly lot to B., the defendant's grantor, the deed to the latter by a description which located the division line so as to throw the

party wall and two inches of land on the westerly side thereof within the plaintiff's lot. The plaintiff recovered a judgment which was reversed at General Term and such reversal affirmed here. It was placed on the ground that as it was a party wall which at the time of the conveyance served as a support for the beams of the house erected on the lot then belonging to defendant, the premises were obviously charged with the servitude of having the beams of the house rest in the wall, and the wall remain as an exterior wall for defendant's house so long as the building should endure. Thus we have the fact of a party wall and an actual existing support therein for the beams of each house and the right to the use of it as an exterior wall. Again there was a space of but two inches beyond the party wall which plaintiff claimed, and that space was so short as to prevent the idea being formed that there was an intention by such conveyance to terminate the character of the wall and the right of defendant to rest his beams upon it. Such right of support existing carried with it, of course, the right to occupy this space of two inches between the easterly boundary of defendant's lot and the wall, with the timbers which were to be supported in the wall.

In the case at bar there was no party wall and no support and no right of support for the beams of defendant's house. The exterior wall of an existing house had simply been utilized as being partition enough between the houses, and no part of it was used for a support of any of the timbers of the house in question, and this wall was five feet from the line of the premises which were actually conveyed to the defendant.

The character of the easement claimed by defendant, in effect, does not differ from the claim of the fee to the five feet, for the right to occupy the space with the front and rear walls, and to have the western wall of the other building serve as the eastern exterior wall of defendant's, requires in its exercise the actual and exclusive possession of that amount of land, although it was never conveyed to defendant. There is no intention to make a conveyance of any such right

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expressed in the deed, and there is nothing in the *Rogers Case* which compels or authorizes us to imply such an intention. We have looked at the other cases cited by defendant's counsel, but they plainly have no application.

What has been said in regard to the claim of defendant as to the five feet, applies with stronger force to the alleged easement for the maintenance of the privy, hydrant, etc. This alleged claim is plainly untenable, as not being in any sense an appurtenant to the land conveyed, not necessary to its enjoyment, and scarcely even more convenient.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ASA ELLWOOD et al., Appellants, v. ALBERT NORTHRUP,
Respondent.

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The requirements of the statute in reference to the sale of an infant's real estate must be strictly pursued in order to validate such a sale.

The burden is upon one claiming under a title, acquired at such a sale, to establish by affirmative evidence that every requirement necessary to give jurisdiction has been complied with; there is no presumption of compliance in the absence of proof.

In an action of ejectment defendants claimed title under a conveyance in proceedings under the Revised Statutes providing for the sale of real estate belonging to infants. (2 R. S. 194, § 167, *et seq.*) The only proof of compliance with the statute was of the presentation of a petition to the county judge for a sale and appointment of a special guardian, the appointment, the execution by the guardian of a bond and the approval thereof. No reference to a master or referee to inquire into the merits of the application as required (§ 175) was proved, or that the court was informed of the situation and value of the land, the reason for its sale, the name of the intended purchaser, the price to be paid or the manner of payment; nor was it shown that a sale was ordered or the contract of sale confirmed (§§ 177, 178). *Held*, that a valid sale was not established and the purchaser acquired no title under the conveyance.

Defendant also claimed, by adverse possession for more than twenty years, under a claim of title founded on a deed from W., executed in 1856. The premises were originally part of a farm purchased by L., but con-

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veyed to W. in trust for the "sole use, benefit and behoof" of L. The latter died in 1846, leaving a will executed in 1839, by which he devised a portion of the farm to his daughter P., for life, remainder to her male heirs. By the will provision was made for payment of a mortgage on the farm by applying thereon moneys due the testator upon a larger mortgage held by him. W. was one of the executors of said will. A division of the farm was made, with the assent of W., among the devisees, and the premises in question were set off to P., who took possession and was in possession at the time of the execution of the deed by W. P., died in 1870. W. was held by the trial court to have been, at the time of the execution of his deed, a mortgagee in possession, upon evidence to the effect that there was found among his papers after his death the mortgage upon the farm with an indorsement thereon signed by B., the then holder, dated in 1843, acknowledging the receipt of one dollar in full discharge thereof, also an assignment of the mortgage from B. to W., dated in 1842, but acknowledged on the same day the discharge was executed. It did not appear that W., ever entered into possession of the property or claimed to hold it by virtue of the mortgage or by any other right or tenure. The mortgage referred to in the will as the source of payment of B.'s mortgage was satisfied of record, on the day after the date of the discharge. W., settled his accounts as executor without any claim of any indebtedness to him on account of payment of the mortgage. *Held*, that the decision of the trial court was error; that the grantee of W. took no interest under his deed, because it was void under the statute by reason of the adverse possession of P., at the time of its execution and because at that time W. had no possession of the premises or mortgage thereon.

(Argued May 10, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 21, 1885, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

Denis O'Brien for plaintiffs. The deed from Watson to Walrath, construed in connection with the declaration of trust from Walrath to Leib, operated to vest the entire estate, both legal and equitable, in Leib. (*Rawson v. Lampman*, 5 N. Y. 456; *Treadwell v. Archer*, 76 id. 196; *Van Hagan v. Van*

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Rensselaer, 18 Johns. 420; *Rogers v. Smith*, 47 N. Y. 324; *Dickson v. Rice*, 16 Hun, 422, 424; *Rarabitschek v. Blank*, 80 N. Y. 478; *Rogers v. Kneeland*, 10 Wend. 219; *Hill v. Miller*, 3 Paige, 254; *Payne v. Jones*, 76 N. Y. 275, *Peyser v. McCormack*, 7 Hun, 300; 3 R. S. [7th ed.] 2326, §§ 6, 7; id. 2180, 2181, §§ 45-55; 2 id. [1st ed.] 134, 135, §§ 6, 7; *Cook v. Barr*, 44 N. Y. 156; *Duke of Cumberland v. Graves*, 9 Barb. 595; *Corse v. Leggett*, 25 Barb. 390; *Wright v. Douglass*, 7 N. Y. 564; *Vernon v. Vernon*, 53 id. 351; *Martin v. Funk*, 75 id. 134, 141; 1 id. [1st ed.] 727, 728, §§ 45, 55, 47, 49; 1 id. 729, § 60; 3 id. [7th ed.] 2182, §§ 59, 60; *Bennett v. Garlock*, 10 Hun, 328; *Foster v. Coe*, 4 Lans. 53; *Tobias v. Ketcham*, 32 N. Y. 319; *People v. Robinson*, 29 Barb. 77; *Duvall v. Eng. Church*, 53 N. Y. 500; *Marvin v. Smith*, 46 id. 471; *Galleo v. Eagle*, 1 T. & C. 124; *White v. Howard*, 52 Barb. 316; *Cooke v. Platt*, 98 N. Y. 35; *Selden v. Vermilyea*, 3 id. 526; 1 Barb. 58; *Adams v. Perry*, 43 id. 456, 487, 496; *Hagerty v. Hagerty*, 9 Hun, 175.) The trust attempted to be created was invalid and the absolute title was vested in Leib. (1 R. S. [1st ed.] 728, § 55; 3 id. [7th ed.] 2181, § 55; *Anderson v. Mather*, 44 N. Y. 258; *Hotchkiss v. Elting*, 36 Barb. 38; *Wright v. Douglass*, 7 N. Y. 564; *Cushney v. Henry*, 4 Paige, 345; *Bennett v. Garlock*, 10 Hun, 328, 338; *Fisher v. Hall*, 41 N. Y. 424; *Rawson v. Lampman*, 5 id. 456; 3 R. S. [7th ed.] 2188, § 74; 2181, § 49; *N. Y. Dry D. Co. v. Stillman*, 30 N. Y. 174, 191, 194; *Clark v. Crego*, 47 Barb. 599, 614; *Smith v. Bowen*, 35 N. Y. 83, 87; *Fellows v. Heermans*, 4 Lans. 231, 238; *Maurice v. Maurice*, 43 N. Y. 364; *White v. Howard*, 52 Barb. 316; Gerard's Titles, 277; Revisers' Notes, 3 R. S. [2d ed.] 583; *Siemon v. Schurck*, 29 N. Y. 598, 610, 611.) By the will of Leib an estate for life was devised to Peggy Ellwood, with remainder to the male heirs of her body. (*Crosby v. Wendell*, 6 Paige, 548; *Roseboom v. Roseboom*, 81 N. Y. 356, 357; *Southerland v. Gesner*, 27 Hun, 282; *Bliven v. Scymour*, 88 N. Y. 469; *Phillips v. Davies*, 92 id. 199; 3 R. S. [7th ed.] 2180, § 47; *Jennings v. Conboy*, 73 N. Y. 236, 237;

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Wright v. Douglass, 7 id. 564; *In re Craig*, 1 Barb. 33; *Taggart v. Murray*, 53 N. Y. 233; *Van Nostrand v. Moore*, 52 id. 12; *Van Vechten v. Keator*, 63 id. 52; *Trustees of Kellogg*, 16 id. 84; *Sweet v. Chase*, 2 id. 73; *Everett v. Everett*, 29 id. 39, 83; *Clark v. Lupp*, 88 id. 228; 3 R. S. [7th ed.] 2175, 2176, §§ 7-13; 4 Kent's Com. 197, 202; 2 Wash. on Real Estate [4th ed.], 547; *Moore v. Littel*, 41 id. 66; *Livingston v. Green*, 52 id. 118, 119; *Chism v. Keith*, 1 Hun, 589; *Drake v. Lawrence*, 19 id. 112; *Sheridan v. House*, 4 Keyes, 569; *Bennett v. Garlock*, 10 Hun, 337-339; 3 R. S. [7th ed.], 2205, § 1; *Kelly v. Kelly*, 5 Lans. 443; *Guernsey v. Guernsey*, 36 N. Y. 267; *Taggart v. Murray*, 53 id. 233; *Terry v. Wiggins*, 47 id. 512; *Hagerty v. Hagerty*, 9 Hun, 175; *Post v. Hover*, 33 N. Y. 593; *Butler v. Butler*, 3 Barb. Ch. 305; *Mason v. Jones*, 2 Barb. 231; *Dubois v. Ray*, 35 N. Y. 162; *Smith v. Edward*, 88 id. 102; *Adams v. Perry*, 43 id. 487, 488; *Heermans v. Robertson*, 64 id. 332; *Van Schuyver v. Mulford*, 59 id. 426; *Harrison v. Harrison*, 36 id. 543; *Schettler v. Smith*, 41 id. 328; *Post v. Hover*, 33 id. 593; 30 Barb. 313; *Parks v. Parks*, 9 Paige, 108; *Hartun v. Corse*, 2 Barb. Ch. 507; *Van Vechten v. Van Vechten*, 8 Paige, 105; *Vail v. Vail*, 7 Barb. 227; *James v. Beasley*, 14 Hun, 521; *De Kay v. Irving*, 5 Denio, 646; *Howley v. James*, 16 Wend. 60; *Lang v. Ropke*, 5 Sand. 363; *Martin v. Martin*, 15 Week. Dig. 233; 3 R. S. [7th ed.], 2180, §§ 47, 49; *Selden v. Vermilyea*, 3 N. Y. 526; *Fisher v. Hall*, 41 id. 417; 3 R. S. [7th ed.], 2177, § 28; *Moore v. Littel*, 41 N. Y. 66; *Barber v. Cary*, 11 id. 401.) The jurisdiction to sell infants' estates is a special statutory one, and can only be exercised in the manner directed by the statute. Every requisite of the statute must be complied with or no title will pass. (*Battell v. Torrey*, 65 N. Y. 294; *Stillwell v. Swartout*, 81 id. 109; *In re Valentine*, 72 id. 184; *Howell v. Mills*, 53 id. 322; *People v. Hulburt*, 46 id. 110; *Stiles v. Beeman*, 1 Lans. 90; 4 Wall. 435; 13 Wend. 465; 4 Hill, 76; 17 Barb. 202; 50 N. Y. 13; 34 Barb. 106; 4 N. Y. 257; 6 Hill, 415; 1 Edw. Ch. 507; 32 Barb. 49; 1 Hill, 130; 7 Hun, 557; 3 R. S.

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[6th ed.] 201, § 118; Code Civ. Pro., § 2354; *Rea v. McEachron*, 13 Wend. 465.) In order to pass the infants' title, the deed must, on its face, purport to be the act and the deed of the infants by their guardian, and be executed in their names by him, or it must purport to be the deed of the special guardian and executed by him as such. (*Hyatt v. Seeley*, 11 N. Y. 52; *Cole v. Gromley*, 76 id. 527; *Briggs v. Partridge*, 64 id. 357; *Spencer v. Field*, 10 Wend. 88; *Townsend v. Orcutt*, 4 Hill, 351; *Stone v. Wood*, 7 Cow. 453; *Guyon v. Lewis*, 7 Wend. 26; *Sherman v. N. Y. C. R. R. Co.*, 22 Barb. 239; *Townsend v. Corning*, 23 Wend. 435; *In re Windle*, 2 Edw. Ch. 585; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 id. 571; *Peck v. Gardner*, 9 Hun, 704; *Kierstead v. Orange & A. R. R. Co.*, 69 N. Y. 343; Laws of 1872; chap. 524, § 1.) As no order of confirmation was made, the infant's title did not pass. It is only when the sale has been confirmed by the court that the title of the infant is divested by the deed. (3 R. S. [6th ed.] 201, § 122; *Rea v. McEachron*, 13 Wend. 465; *Atkins v. Kimran*, 20 id. 241, 249; *Terwilliger v. Brown*, 59 Barb. 9, 14; 44 N. Y. 237; *Rex v. Croke*, 1 Cowp. 26; *Jackson v. Shepard*, 7 Cow. 88; *Battell v. Torrey*, 65 N. Y. 294, 297; *Sharp v. Johnson*, 4 Hill, 92; *In re Valentine*, 72 N. Y. 184, 187; *Rogers v. Dill*, 6 Hill, 415; *Battell v. Burrill*, 50 N. Y. 13; *Onderdonk v. Mott*, 34 Barb. 106; *Newell v. Wheeler*, 48 N. Y. 486; *Hopkins v. Mason*, 61 Barb. 469; *Stiles v. Beeman*, 1 Lans. 90; *Baker v. Lorillard*, 4 N. Y. 257; *People v. Hulburt*, 46 id. 110, 113; *Guest v. City of B.*, 79 id. 624; *Roukendorf v. Taylor*, 4 Pet. 349; *Doughty v. Hope*, 3 Den. 595; *Thatcher v. Powell*, 6 Wheat. 119; *Jackson v. Estey*, 7 Wend. 146; *Bunner v. Eastman*, 50 Barb. 639; *Hilton v. Bender*, 69 N. Y. 76, 81, 83.) The recitation in the order appointing a special guardian, that it appeared there was a reasonable ground for the sale of the real estate, did not show that the matter, had been investigated by the court. (3 R. S. [6th ed.] 201, §§ 114, 119, 121; Code of Civ. Pro. § 2348.) All instruments and deeds

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purporting to have been executed on behalf of infants, which do not take effect by delivery of their hands, are absolutely void, because an infant cannot delegate a naked authority. (*Zouch v. Parsons*, 3 Burr. 1794; *Conroe v. Birdsall*, 1 Johns. Ch. 127; *Fonda v. Van Horn*, 15 Wend. 631; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mia*, 17 Wend. 119, 130, 131; *Ely v. Ehle*, 3 N. Y. 508; *Kain v. Postley*, 2 Edm. Sel. C. 132; *Gallatian v. Cunningham*, 8 Cow. 362; 2 Coke's Litt. Conf. Y. pl. 5; 5 Viner Abbr. 389, 390; Tit. Conf. Y. pl. 5; 7 Wait's Act. & Def. 137; *Willard v. Hewlett*, 19 Wend. 301; *Goodsell v. Myers*, 3 id. 480; *Walsh v. Powers*, 43 N. Y. 23; *Jackson v. Burchin*, 14 Johns. 124; *Voorhis v. Voorhis*, 24 Barb. 150; *Jackson v. Carpenter*, 11 Johns. 539; *Chapin v. Shafer*, 49 N. Y. 407; 3 id. 508; 3 R. S. [7th ed.] 2194 § 137; *Morse v. Vosburgh*, 57 Barb. 243.) The trial court was correct in its conclusions that the defendant was not entitled to protection as a *bona fide* purchaser without notice of plaintiff's claim. (3 R. S. [7th ed.] 2215, § 1; *Trustees v. Wheeler*, 61 N. Y. 89; *Depeyster v. Hildreth*, 2 Barb. Ch. 110; *Hooker v. Pierce*, 2 Hill, 650; *Ackerman v. Hunsicker*, 85 N. Y. 43; *Corse v. Leggett*, 25 Barb. 390; *Decker v. Boice*, 83 N. Y. 215; *Smyth v. Knick. Ins. Co.*, 84 id. 589; *Vorebeck v. Rue*, 50 Barb. 302; *Bacon v. Van Schoonhoven*, 87 N. Y. 446, *Acer v. Westcott*, 46 id. 384, 392; *Gilbert v. Peteler*, 38 id. 165; *Chautauqua Bk. v. Risley*, 4 Denio, 480; *Jackson v. Parkhurst*, 9 Wend. 209; *Jumel v. Jumel*, 7 Paige, 591, *Tuttle v. Jackson*, 6 Wend. 213; *Neesome v. Clarkson*, 1 Hare, 162, 163; *Brush v. Ware*, 15 Pet. 93; *McBurney v. Cutter*, 18 Barb. 203; *Cuyler v. Bradt*, 2 Caines, C. 326, *Briggs v. Palmer*, 20 Barb. 392; *Briggs v. Davis*, 20 N. Y. 15; 51 id. 646; *Demeyer v. Legg*, 18 Barb. 14.)

John Lansing for defendant. The proceedings for the sale of the infant's interest in the real estate were valid. (2 R. S. 194, 195, §§ 170, 171, 172, 174, 175, 177, 178; 3 R. S. [6th ed.] 201, §§ 114, 115, 116, 118, 119; Laws of 1814, chap. 108, § 1;

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Laws of 1815, chap. 106, § 1; Chancery Rules, 1830, Nos. 158, 159, 160; *Cole v. Gourley*, 79 N. Y. 527-535; *In re Hazard*, 9 Paige, 365; *In re McIlvanis*, 15 Abb. 91; 2 R. S. 54, § 12; 3 R. S. [6th ed.] 55, § 13.) Walrath had a right to hold the title and retain possession until he was fully paid for all he had advanced. The deed was in fact a mortgage. (*Stoddard v. Whitney*, 46 N. Y. 627-632; *Carr v. Carr*, 52 id. 251-258; *Brumfield v. Boutall*, 24 Hun, 451; *Corse v. Leggett*, 25 Barb. 389.) By the payment and assignment of the Depau mortgage to Walrath while he was in possession of the premises he became a mortgagee in possession, and had the right to retain possession until he was paid his advances. (1 Jones on Mort. 715; *Hubbell v. Moulson*, 53 N. Y. 225; *Van Duyne v. Thayer*, 14 Wend. 233; *Chase v. Peck*, 21 N. Y. 586; *Kortright v. Cady*, id. 343-365; *Mad. Ave. B. Ch. v. Oliver St. B. Ch.*, 73 id. 82-94; *Robinson v. Ryan*, 25 id. 320; *Ross v. Boardman*, 22 Hun, 527-530; *Beach v. Cook*, 28 N. Y. 508; *Griffin v. L. I. R. R. Co.*, 101 id. 348-354.) The deed from Watson to Walrath in connection with the writing between Walrath and Lieb, did not vest the legal title to the land conveyed in Casper I. Lieb. (2 R. S. 134, § 6; 3 R. S. [6th ed.] 141, § 6; Laws of 1860, chap. 322; *Cook v. Barr*, 44 N. Y. 156-161; *Wright v. Douglass*, 7 id. 564-568; 1 Wood's Conveyancing, 630; *Yelverton Case*, 37 Eliz. B. R. 5, 6; 22 Viner, 216, 217; *N. Y. Dry Dock Co. v. Stillman*, 30 N. Y. 174-192.) The title to the land conveyed by Watson to Walrath passed by the deed absolutely to Walrath. Lieb had no legal title to the same. (1 R. S. 728, §§ 51, 52; 2 R. S. [6th ed.] 1105, §§ 51, 52; *Garfield v. Hatmaker*, 15 N. Y. 475; *Hurst v. Harper*, 14 Hun, 280; *Everett v. Everett*, 48 N. Y. 218; *Davis v. Graves*, 29 Barb. 480; *Woodhull v. Osborne*, 2 Edw. Ch. 614-619; *Reitz v. Reitz*, 80 N. Y. 538-542; *Siemon v. Schurck*, 29 id. 598-610; *Norton v. Stone*, 8 Paige, 222-225.) The conveyance to Walrath being absolute on its face, and the defendant having purchased the premises and actually paid the consideration money without notice of the rights of the plaintiff-

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iffs or their ancestor, defendant's title is perfect. (*Whitbeck v. Kane*, 1 Paige, 202-203; *Grimstone v. Carter*, 3 id. 421-438; *Mills v. Comstock*, 5 Johns. Ch. 214; *Tarball v. West*, 86 N. Y. 280; *Stoddard v. Rotton*, 5 Bosw. 378; 1 R. S. 730, § 64; 2 R. S. [6th ed.] 1110, § 64.)

RUGER, Ch. J. This was an action of ejectment to recover an undivided three-fifths part of a parcel of one hundred and thirty acres of land in Jefferson county, by the male heirs of one Peggy Ellwood.

The plaintiffs claim to have acquired title to such land under the will of their grandfather, Casper J. Lieb, who died in March 1846. By such will Lieb devised to his daughter, Peggy Ellwood, one hundred and thirty acres of land, being part of a farm of three hundred and twenty-five acres purchased by him of Eli Watson, the conveyance of which was made to Adam W. Walrath in "trust for my sole use, benefit and behoof." The demise was to said daughter "for and during her natural life, in trust for the male heirs of her body to have and to hold the same from and after the death of their said mother Peggy." The remainder of the farm was devised to his daughter Mary, wife of said Adam W. Walrath, substantially upon the same terms and conditions as attended the devise to Peggy. By the will which was originally executed in 1839, provision was made for the payment of a mortgage upon the farm for \$1,500 held by one Depau, by applying thereon moneys due the testator from one Brown, upon a mortgage held by him against Brown, for a larger sum.

Adam W. Walrath was made one of the executors of the will and he, after the death of Lieb, entered upon the performance of his duties, and, so far as appears, fully administered the estate. Immediately upon the death of Lieb, the farm was surveyed and a division was made among the devisees, Mary with her husband continuing to occupy the part devised to her, which was previously occupied by her husband, and Peggy taking possession of the one hundred and thirty acres devised to her, and continuing to occupy

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them until 1856. She died in 1870 and this action was commenced in 1881.

The defenses to the action as stated in the answer, were substantially as follows;

First. A denial of any knowledge or information sufficient to form a belief that plaintiffs, as tenants in common, were seized and possessed of an estate of inheritance in fee simple absolute of said premises.

Second. Certain proceedings taken in May, 1856, under the statute for the sale of infant's real estate, whereby the defendant claimed that his grantor acquired the title of the plaintiffs to the lands in dispute.

Third. That neither the plaintiffs or their ancestors were seized or possessed of the premises within twenty years before the commencement of the action.

Fourth. That the defendant and his grantors have been in adverse possession of the premises for a period exceeding twenty-five years under a claim of title founded upon a deed thereof dated April 11, 1856, from one Adam W. Walrath who was claimed to have held title thereto.

On the trial the defendants, among other conveyances, put in evidence a quit-claim deed of the premises, dated April 11, 1856, upon a consideration of one dollar, from Adam W. Walrath to one Wooliver, the defendants' remote grantor. The trial court found all of the issues of fact made by the pleadings for the plaintiffs, but also found that the defendant, under the deed from Adam W. Walrath, succeeded to all of his rights to such land, among which was the right of mortgagee in possession, as owner of the Depau mortgage. It refused to find, upon plaintiffs' request, that Walrath was not in possession of the premises in dispute at the date of his deed, to which refusal the plaintiffs excepted.

The uncontradicted evidence established the fact that Peggy Ellwood entered into possession of the 130 acres in 1846, under the devise from her father, and continued in such possession, with the knowledge and consent of Walrath, until 1856, and held such possession under a claim of title at the

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date of Walrath's deed to Wooliver. (*Baker v. Lorillard*, 4 N. Y. 257.)

The entire evidence upon which Walrath was held to be a mortgagee in possession was admitted against plaintiffs objection, and consisted of the facts, that after his death, in 1881, his widow found among his papers the Depau mortgage, with an indorsement thereon reading as follows :

"Received, January 23, 1843, of Adam W. Walrath, one dollar in full discharge of the above and within mortgaged premises, which mortgage has been duly assigned to me.

"STEPHEN W. BROWN. [L. s.]"

This discharge was duly acknowledged on the same day by Brown before a Supreme Court commissioner. There was also found among the papers an assignment of the same mortgage from Brown to Walrath, dated May 10, 1842. This assignment was also acknowledged by Brown on the same day he executed the discharge of the mortgage. It does not appear that Walrath ever claimed any interest under this mortgage, or ever entered into possession of the property, or claimed to hold it by virtue of such mortgage or by any other right or tenure whatever. It also appears that the mortgage held by Lieb against Brown for \$4,000 was satisfied of record on January 24, 1843, almost simultaneously with the satisfaction of the Depau mortgage. The evidence also shows that when Lieb purchased the Watson farm, in 1836, he paid the whole consideration therefor, with the exception of the amount of the Depau mortgage and a small balance of about \$250, and the title therefor was taken in the name of Walrath, as trustee for Lieb, with the view of protecting it from anticipated claims of Lieb's wife, with whom he was then at variance. Thereafter both Lieb and Walrath lived on the farm until Lieb's death in 1846. Lieb was the purchaser in fact of the farm and, as conceded both by the trial court and the General Term, took an absolute title in fee under the statute of uses and trusts to the same under the

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conveyance thereof by Watson to Walrath, and an agreement of trust simultaneously executed therewith between Lieb and Walrath.

As between Walrath and Lieb, the latter was primarily liable for the payment of the Depau mortgage, and if any presumption of an indebtedness from Lieb to Walrath could arise under the circumstances of this case for payments made thereon by Walrath, it would be fully rebutted by the voluntary division of the farm between the devisees of Lieb, after his death, with Walrath's assent, and without any claim on his part of an interest therein, and the administration of the estate of Lieb by Walrath, as executor thereof. As such executor he had the right to retain, as a creditor of the estate, so much of the assets as were necessary to discharge his debts (2 Wms. Exr's, 896, 897), and in the absence of any claim on the part of Walrath, during his life, that the debt had not been paid, a conclusive presumption arises that, if it ever existed, it had in fact been paid. We, have therefore, reached the conclusion that Wooliver took no interest in the premises in question by his deed from Walrath:

First. Because it was void by statute by reason of Peggy Ellwood's adverse possession of the premises conveyed at the time of its execution.

Second. Because Walrath did not have possession of the property at the time of the conveyance.

Third. Because he had no mortgage thereon at that time.

The trial court therefore erred in dismissing the complaint on the ground that the defendant was a mortgagee in possession. The court at General Term, however, did not pass upon this question, but affirmed the judgment upon the ground that the proceedings by which the interest of the plaintiffs in the land was sold in 1856 were a substantial compliance with the provisions of the statute relating to the sale of infants' real estate, and that the conveyance executed by the special guardian appointed in such proceedings vested the title in Wooliver, the grantee, through whom the defendant derived his title.

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We are unable to concur with that court in this conclusion. The common law does not recognize any mode by which an infant can be deprived of his title to real estate, against his consent or that of some person duly authorized to act on his behalf. (*Rogers v. Dill*, 6 Hill, 415; *Forman v. Marsh*, 11 N. Y. 544, 551; *Baker v. Lorillard*, 4 id. 257.) The statute has, however, provided a method by which such an interest may lawfully be sold, but this being a special proceeding, its requirements must be strictly pursued in order to validate such a sale. The statutes in force in 1856, at the time of this sale, were substantially as follows: By section 170, article 7, title 2, chapter 1, part 3, Revised Statutes (Edm. Stat. at Large, vol. 2, pp. 202, 203), power was given to the Court of Chancery, upon the application of any infant seized of real estate, to order the sale or disposition of his property in the manner therein directed. The mode of procedure was prescribed to be as follows: (§ 171.) The appointment of some suitable person as special guardian of the infant for such proceedings. (§ 172.) The execution by such guardian of a good and sufficient bond for the faithful performance of the trust reposed in him. (§ 174.) Upon the filing of such bond the court was authorized to proceed "in a summary manner, by reference to a master, to inquire into the merits of the application." (§ 175.) If it thereby satisfactorily appeared to the court, for any of the reasons set forth in the statute, that a disposition of any part of the real estate of the infant was necessary and proper, it was authorized to order its sale or disposition by such guardian. (§ 177.) Upon an agreement for a sale or other disposition of the property being made by the guardian, in pursuance of the order therefor, he was required to report it on oath to the court, and if it was confirmed, a conveyance thereof was authorized to be executed under the direction of the court. Section 178 then provides: "All sales, leases, dispositions and conveyances made in good faith by the guardian in pursuance of such orders, when so confirmed, shall be valid and effectual as if made by such infant when of full age." The powers conferred the upon

Court of Chancery were subsequently extended to County Courts by the Code of Procedure.

No evidence whatever was offered of any compliance with the provisions of the statute above set forth, except the presentation to the Jefferson County Court of a petition for an order of sale and the appointment of a special guardian to make such sale; the appointment of such guardian and the execution by him of a bond, and the approval thereof by the county judge.

None of the provisions so carefully framed by the statute to inform the court of the circumstances of the case, and the propriety of the sale, were pursued or regarded by the parties conducting the proceedings. As appears from the evidence, no reference to a master, or to a referee who is made the substitute for one was ever made, and the court was never informed of the situation and value of the land, the reasons for its sale, the name of the intending purchaser, the price to be obtained, the manner of its payment or any of the circumstances, which would enable it to exercise its judgment in pronouncing upon the propriety or prudence of the intended sale, or its effect upon the interests of the infants. No order was ever made by the court except that appointing a special guardian for the purposes of the petition.

It is quite obvious from the plain reading of the statute, that it was intended thereby that the judgment of the court upon all of these questions should be the condition of any authority in the special guardian to execute a conveyance. It is impliedly required that a conveyance shall be preceded by a contract of sale, and that such contract shall be reported by the guardian on oath to the court. Upon confirmation of such report, and only in that event, is there any authority under the statute for the transfer of an infant's title to real estate. (*Stilwell v. Swarthout*, 81 N. Y. 109; *Rea v. McEachron*, 13 Wend. 465.) This view is further confirmed by section 178 of the statute, which, by necessary implication forbids any other sale, and declares all sales, dispositions and conveyances, which are not made in pursuance of such orders so con-

firmed, to be void. Under the provisions of the statute no general authority can be conferred upon a special guardian to sell and convey an infant's real estate, but every sale must be specially reported to the court, and specially approved by it, and special authority, to make the particular conveyance must be obtained in order to vest the title in a purchaser.

It is elementary, that statutory provisions in derogation of the common law, by which the title of one is to be divested, and transferred to another, must be strictly pursued, and every requisite thereof having the semblance of benefit to its owner, must be complied with in order to divest his title. (*Atkins v. Kinnan*, 20 Wend. 241; *Battell v. Torrey*, 65 N. Y. 294, 299; *Stilwell v. Swarthout*, 81 id. 109.)

In the *Matter of Valentine* (72 N. Y. 184, 186), which was a proceeding under the statute for the sale of the real estate of a lunatic, Judge CHURCH says: "The petition in this case was proper, and gave the court jurisdiction to proceed and determine the subject-matter involved; but it conferred jurisdiction to proceed, not according to the direction of the court, but in accordance with the statute. * * * The statute provides that on the presenting of such petition, it shall be referred. * * * In this case no reference was made, and there was no hearing of the parties interested and no report. We think that this requirement was substantial and cannot be dispensed with, and that its omission constitutes a fatal defect to the proceeding."

In *Battell v. Torrey* (65 N. Y. 294, 296), in proceedings under the statute to sell or mortgage the real estate of an infant, which resulted in a mortgage, it was held that the mortgage executed was void because the provisions of the statute were not complied with. The court said: "The right to execute such a mortgage is, by the statute authorizing such proceedings, made to depend upon a confirmation by the court of the agreement reported; then, in the language of the statute, if it be confirmed, a conveyance shall be executed under the direction of the court."

These authorities seem to be in point upon the questions

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involved in this case, and must be deemed controlling in its determination. The plaintiffs were, by reason of their infancy, not only incapable of conveying their land, but incompetent to consent to, or validate any of the proceedings taken to procure its disposition. They stood in the position of parties hostile to the proceedings and objecting to every step taken therein.

The burden of proof to show that they acquired the infants' title, rested upon the defendant, and he must establish, by affirmative evidence, that every requirement of the statute necessary to confer jurisdiction upon the court to order a sale of the infants' property has been complied with. In the absence of proof thereof, there are no presumptions in such proceedings that material requirements of the statute have been performed or complied with. Its jurisdiction is made conditional, and the circumstances upon which it depends must be made to appear by proof. The other questions in the case were properly disposed of by the courts below.

The judgments rendered by the General and Special Terms must be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgments reversed.

THE JEFFERSON COUNTY NATIONAL BANK, Respondent, v.
JOHN C. STREETER, Appellant.

The effect of the amendment of 1874 of the provision of the bankrupt act (§ 39), in reference to the recovery of money or property paid, sold, assigned or transferred by a bankrupt contrary to the act, was to remove the prior absolute prohibition against the proof of a debt by a creditor who had obtained a preference which had been annulled, and to confine the prohibition to cases of actual fraud, and to limit it even in those cases to a disability to prove more than one-half of the debt. In an action against an indorser of certain promissory notes, it appeared that plaintiff duly obtained judgment against the makers on default.

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After personal service of process executions were issued and levied on a stock of goods. Thereafter proceedings in bankruptcy were commenced against the judgment debtors, and upon application of the petitioning creditors, the attorney for the plaintiff consenting, an order was made by the bankruptcy court appointing the sheriff special receiver of the bankrupt's estate, and directing him to sell the property levied on and deposit the proceeds subject to the further order of the court. The order also provided that the lien of the judgment-creditors, if any, should "follow and attach to the moneys arising from the sale." In an action subsequently brought by the assignee in bankruptcy it was adjudged that plaintiff's judgments were void as against the assignee, and that the latter was entitled to the proceeds of sale of the goods, not because of any actual fraud on the part of plaintiff, but on the ground of constructive fraud, growing out of the fact that its attorney had notice of the insolvency when he commenced the actions against the bankrupts, and designed to obtain a preference. *Held*, that the obtaining of the judgments and the levy upon the property of the bankrupts was such a transfer of property as brought the case within said provision; but that plaintiff was not debarred from proving its debt; and that, therefore, its action did not prejudice or interfere with defendant's rights as indorser and so constituted no defense. Also, *held*, that the decision of the bankruptcy court that no lien was acquired by the levy as against the assignee was conclusive, and the question was not open for contestation by the defendant.

It seems that to constitute actual fraud within the meaning of said provision, actual complicity or a conscious purpose on the part of the creditor to accomplish a known fraud upon the act must be shown.

(Argued May 11, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made at the April Term, 1885, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought against defendant as indorser of three promissory notes made by the firm of H. O. Cadwell & Co. The answer contained two counts: The first alleged in substance that defendant was an accommodation indorser; that plaintiff obtained judgments against the makers, issued executions thereon, and that the sheriff under said executions levied on property of the makers and sold the same for more

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than sufficient to satisfy the judgment. The second count alleged that plaintiff, in fraud of the provisions of the bankrupt act, knowing the makers to be insolvent, and for the purpose of having their property applied to the payment of the notes contrary to the provisions of said act, obtained said judgments against the makers and procured the levy upon and sale of their property. That proceedings in bankruptcy were thereafter commenced against the makers, and the assignee in bankruptcy brought suit against plaintiff, in which it was adjudged that the judgments, levy and sale were fraudulent and void. By reason whereof plaintiff and defendant were debarred of all rights and remedies against the property of the makers, and that thereby defendant was discharged from all liability as indorser.

The material facts are stated in the opinion.

Denis O'Brien for appellant. The plaintiff in this action procured from the makers of the notes in suit a fraudulent and preferential judgment, which was forbidden by the bankrupt law. (*Brown v. Jeff. Co. Nat. B'k*, 19 Blatch. R. 333.) This fraudulent and unlawful preference should have been surrendered by the bank. (Bump'on Bankruptcy [9th ed.], 636, 640; *In re Drummond*, 4 Biss. 149; *In re Stephens*, 3 id. 187; Blumenstiel Law and Pr. Bankruptcy, 334, 335.) The bank cannot, under the provisions of the Federal Statute, prove the notes indorsed by the defendant, or the judgments recovered upon them, against the estate of the makers. (*Phelps v. Borland*, 103 N. Y. 406; *In re Currier*, 2 Lowell, 436; *In re Drummond*, 4 Biss. 149; *In re Ayers*, 6 id. 48; *In re Leland*, 7 Benedict, 436; *In re Parker*, 6 Sawyer, 248; *In re Stephens*, 3 Biss. 187; *In re Richter*, 1 Dill. 544; *In re Scott*, 4 N. B. R. 414; *Walton v. Walton*, Deady, 445; Blumenstiel's Law and Pr. 334.) In such cases the indorser is discharged from all liability to the holder of the note. (*Bartholow v. Bean*, 18 Wall. 635, 641, 642; *In re Ayers*, 6 Biss. 48; *No. Bk Kentucky v. Cook*, 13 Ky. R. [Bush] 340; *Watson v. Pogue*, 42 Iowa, 582; *Lynch v. Reynolds*,

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16 Johns. R. 40; *Willson's Case*, 11 Vesey, 410; *Brown v. Williams*, 4 Wend. 360; *Germania B'k v. Frost*, 43 N. Y. Sup. Ct. 117, 124; *Schutta v. Fingar*, 100 N. Y. 543, 545.) Without the consent of the bank the sheriff had no right to surrender the property upon which he had levied and remand the funds to another jurisdiction. (*Nat. B. & L. Co., Watertown v. Babbitt*, 17 Hun, 447; *Ansonia B. & C. Co. v. Babbitt*, 74 N. Y. 395; *O'Brien v. Weld*, 92 U. S. R. 83, 16 Wall. 551; 14 id. 419; *Decker v. Rupp*, 67 N. Y. 464; *Gardner v. Oliver Lee & Co's B'k*, 11 Barb. 558; *Phelps v. Borland*, 103 N. Y. 411.)

John Lansing for respondent. By the recovery of the judgment by the plaintiff, against Caldwell & Co., the makers of the notes, and the execution and levy on the goods of the makers, which judgment and levy were subsequently, by the decree of the District Court, decreed to be void as against the assignee of the bankrupts as a fraudulent preference, the plaintiff was not precluded from proving the notes as against the bankrupts' estate. (14 U. S. Stat., 528, § 23; id. 536, § 39; R. S. of U. S., § 5084; 1 Sup. to R. S. of U. S., 72; 19 Blatchf., 315; *In re Black*, 17 N. B. Reg. 399; *In re Reardon*, 14 id. 332; Bump on Bank'y, [9th ed.] 96; *In re Newcomer*, 18 N. B. R. 85; *In re Shoenberger*, 15 id. 305; *In re Graves*, 9 Fed. Rep. 816, *In re Cramer*, 13 N. B. R. 225.) It was the intention of congress, by the amendment of 1874, to distinguish between actual and constructive fraud, and remove every other limitation upon the proof of debts by honest creditors. (*Barr v. Hopkins*, 12 N. B. R. 211; *In re Black*, 17 id. 399; *In re Newcomer*, 18 id. 85; *In re Kaufman*, 19 id. 283; *In re Reed*, 3 Fed. Rep. 798.) The plaintiff not having deprived itself of the right to prove its claim against the bankrupt's estate, has not deprived the defendant, the indorser, of the right he has as such indorser to prove the claim. (R. S. of U. S., § 5070.) Even if the bank had by its acts deprived itself of the right to prove the claim against the bankrupt's estate, that did not and

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could not in any manner affect the right of the indorser to prove such claim as such indorser. (*Smith v. Erwin*, 77 N. Y. 466, 470; *Schutts v. Fingar*, 100 id. 539-544; *Parker v. Stroud*, 98 id. 376.) An indorser, although in the nature of a surety, is not for all purposes, entitled to the privilege of that character. He is answerable upon an independent contract; it is his duty to take up the note when it is dishonored. (*Bradford v. Cory*, 5 Barb. 462, 463; *Trimble v. Thorn*, 16 John. 152-155; *Beardsley v. Warren*, 6 Wend. 610; 8 id. 194; *Converse v. Cook*, 25 Hun, 44; 31 id. 417; *Powers v. Silverstein*, 19 J. & S. 321-324; *Necombe v. Hale*, 90 N. Y. 326-330; *Cardell v. McNiel*, 21 id. 336.) A request by the indorser to sue and collect, and neglect by holder to do so, is no defense to the indorser. (*Hurd v. Little*, 12 Mass. 502; *Pitts v. Congden*, 2 Coms. 352; *Wells v. Mann*, 45 N. Y. 327-330; *Colgrove v. Tallman*, 67 id. 99.) A creditor of a bankrupt does not by consenting to a resolution for a composition, under the United States statute of June 22, 1874 (§ 17), release a person liable as surety for the same debt. (*Gould v. Butler*, 122 Mass. 498; 23 Am. R. 378; *Liebke v. Thomas*, 116 U. S. 605; Baylies on Sureties and Guarantees, 276, § 21.) When a preferential payment has been recovered of the holder of a note by the assignee of the bankrupt the holder can resort to the indorser or surety, such payment being no defense. (*Pritchard v. Hitchcock*, 6 M. & G. 151; *Petty v. Coke*, 6 L. R., Q. B. 789; *Nerington v. Day*, 5 L. R., C. B. 606, 612; *Watson v. Poagae*, 42 Ia. 582; 15 N. B. R. 473.) An act beneficial, or which may be beneficial, to the indorser, and so calculated, may be performed without impairing rights against him. (*Hale v. Holmes* 18 Johns. 28-30; *Lynch v. Reynolds*, 16 id. 41; *Wood v. Jeff. Co. B'k*, 9 Cow. 194-206.) The court in bankruptcy had jurisdiction to make the order appointing the sheriff special receiver, and such order being made on notice was binding on plaintiff whether consented to or not. (*Aus. B. & C. Co. v. Conners*, 103 N. Y. 502-512.)

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ANDREWS, J. There has been some conflict of judicial opinion in the courts of the United States as to the true construction of that part of the amendment to section 39 of the Bankrupt Act of 1867, made by the act of congress of June 22, 1874, which relates to the proof of debts by creditors who had obtained a fraudulent preference. The original section 39 authorized the assignee of a bankrupt to maintain an action to recover back money or property paid, conveyed, sold, assigned or transferred by the bankrupt contrary to the act, "provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent," and the proviso is followed by the declaration that "such creditor shall not be allowed to prove his debt in bankruptcy." The amendment of 1874, substitutes for the last clause in section 39 the following: "And such person, if a creditor, shall not in case of actual fraud, be allowed to prove for more than a moiety of his debt." It was held by Judge BLATCHFORD while sitting as district judge in the case *In re Stein* (16 N. B. Reg. 569) that the only effect of the amendment of 1874, was to create a limitation upon the right to prove debts on a voluntary surrender under section 23 of the act of 1867, and to forbid a creditor in case of actual fraud on his part in obtaining the preference, to prove for more than one-half his debt, notwithstanding he may have surrendered what he had received. But this construction of the amendment of 1874 has not been generally adopted. On the contrary it has been held, in several cases, both in the District and Circuit Courts of the United States, that the intention and true construction of the amendment was to mitigate the harshness of the rule prescribed in the original section 39, which prohibited a creditor who had obtained a preference in fraud of the act, from proving his debt, although he had been deprived of the benefit of the preferential provision, and to confine the prohibition to cases of actual as distinguished from constructive fraud, and even in cases of actual fraud, to limit the penalty of the fraud to a

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denial of the right to prove the debt as to a moiety only. (*In re Black*, 17 N. B. Reg. 399, Dist. Ct. Mass.; *In re Newcomer*, 18 id. 85; 19 id. 283, Dist. Ct. N. J.; *Burr v. Hopkins*, 12 id. 211, Cir. Ct. Wis.; *In re Reed*, 3 Fed. Rep. 798, Cir. Ct. Mass.; *In re Cadwell*, Dist. Ct., N. Dist. N. Y. 1875; *S. C.*, affirmed, Cir. Ct.) This construction is sustained by a large preponderance of judicial authority, and, what is especially important to notice, it has the sanction of the District and Circuit Courts of New York, having the original and final appellate jurisdiction in cases of bankruptcy arising within this State. We think this construction is sensible, and although there may be reason for doubt, we are disposed to follow the general current of authority upon the question, and to hold that in cases coming within section 39 of the act of 1867, the effect of the amendment of 1874 was to remove the prior absolute prohibition against the proof of a debt by a creditor who had obtained a preference which had been annulled, and to confine the prohibition to cases of actual fraud, and to limit it even in those cases to a disability to prove more than one-half of the debt. The original judgments in favor of the bank against Cadwell & Co. were recovered on notes made by Cadwell & Co., indorsed by the defendant Streeter. They were obtained in due course on default, after personal service of process on the defendants in the action. Executions on the judgments were issued to the sheriff, and were levied on a stock of goods of Cadwell & Co. prior to the commencement of the bankruptcy proceedings against the firm. By an order of the District Court, made after the filing of the petition in bankruptcy, upon the application of the petitioning creditors, the attorney for the bank consenting thereto, the sheriff was appointed special receiver of the estate of the bankrupts, and was directed to sell the property levied on and deposit the proceeds of the sale with the usual depository, subject to the further order of the court; but the order provided that "the lien of the judgment creditors, if any," should "follow and attach to the moneys arising from the sale." It was adjudged

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in the action subsequently brought by the assignee in bankruptcy, that the judgments of the bank were void as against such assignee, and that he was entitled to the fund, the proceeds of the goods sold by the sheriff under the order of the bankruptcy court. The judgment in the action by the assignee in bankruptcy does not, on its face, disclose the particular grounds upon which the adjudication therein proceeded. Without going into detail, it is sufficient to say that it is to be collected from the pleadings and the opinion of the court that the judgments and executions in the State courts were set aside as a fraudulent preference, not on the ground of any actual fraud on the part of the bank or its officers, but for constructive fraud growing out of the fact that its attorney, who procured the judgments, had notice of the insolvency of Cadwell & Co. at the time of commencing the actions in favor of the bank, and designed to obtain a preference by means of the proceedings in the State courts, which was imputable to the bank and rendered the judgments void. (See opinion of WALLACE, J., MS.; *Brown v. Jeff. Co. Bank*, 19 Blatch. 315.) It was not, therefore, a case of actual fraud within the act of 1874. It is not very easy to define what is meant by actual fraud in this statute. Judge LOWELL, in the case of *In re Black* (17 N. B. Reg. 399), referring to the words, said: "The meaning of the statute appears to be plain that after a recovery of the damages and costs the creditor may prove his debt, if he have not actually assisted in the fraud." It would seem to require something more than mere imputable fraud to debar a creditor who has acquired an unlawful preference from proving his claim after he has been deprived of his security. The words "actual fraud" were apparently employed in contradistinction to legal or constructive fraud, and are only satisfied, we think, where actual complicity or a conscious purpose on the part of the creditor to accomplish a known fraud upon the act is shown. The evidence comes far short of this proof in this case, and the bank was not therefore debarred from proving its debt,

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provided the obtaining of the judgment and the levy upon the property of the bankrupts under the executions was a conveyance, sale, assignment or transfer of property of the bankrupt within section 39 of the act of 1867. We think these terms must be construed to embrace such a transaction as this, otherwise it would happen that a creditor who merely proceeded to judgment, execution and levy, which afterwards were set aside at the suit of the assignee in bankruptcy as constructively fraudulent, would be in a worse plight as to proving his debt than a creditor who had actually taken and applied the property of the bankrupt upon his debt by way of preference. It cannot be supposed that this discrimination could have been intended. The right of the bank to prove its debt was affirmed by the District and Circuit Courts in this State in respect to another debt held by the bank against the same bankrupt under precisely similar circumstances. It follows that the defendant was not prejudiced by the act of the bank in its dealings with Cadwell & Co. It did not thereby preclude itself from proving its debt against the estate of Cadwell & Co. in bankruptcy, nor interfere with the right of the defendant as indorser. The consent of the bank to the order of the District Court appointing the sheriff as special receiver and directing a sale of the goods levied upon, is not a defense. The order preserved the lien of the execution, if any, and transferred it from the goods to the proceeds. It was subsequently decided by a court of competent jurisdiction that no lien was acquired as against the assignee in bankruptcy. The judgment of the bankrupt court was conclusive upon the bank and the question is not open for contestation by the defendant.

We think the judgment below is right and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

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BANK OF BATAVIA, Respondent, v. THE NEW YORK, LAKE
· ERIE AND WESTERN RAILROAD COMPANY, Appellant.

Where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact to the prejudice of a third person who has dealt with the agent in good faith in reliance upon the representation.

This rule applies as well where a corporation as where an individual is the principal.

While bills of lading are not negotiable in the sense applicable to commercial paper, they are transferable and carry with them the ownership, either general or special, of the property described; the carrier, unless he has limited his liability by stamping his bills as "not negotiable," is bound to know that their office and effect is not limited to the person to whom they are first and directly issued, to recognize the validity of transfers, and to deliver the property only on the production and cancellation of the bills.

A carrier corporation, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill has, in good faith, discounted a draft drawn upon the consignee, although no property was in fact delivered.

No privity is necessary in such a case to make the estoppel available, other than that which flows from the wrongful act of the agent and the consequent injury.

One of defendant's local freight agents, having authority to receive and forward freight and to give bills of lading, specifying the terms of shipment, but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to one W., describing them as received to be forwarded to C., as consignee, but adding, with reference to the packages, "contents unknown." W., drew a draft on the consignee which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were, in fact, shipped by W., or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused. In an action upon the bills of lading, *hæc*, that defendant was liable; and that the recital in the bills that the contents of the packages were unknown was no defense.

106	196
114	130
106	196
133	168
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137	242
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143	563

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Where actual shipment has been made the presumption is that the property delivered corresponds with that described in the bill of lading, and where a bill is issued without the delivery of the property the carrier cannot defend against the wrong by presuming if it had not occurred another would have taken its place.

(Argued May 12, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department in favor of plaintiff, entered upon an order made October 31, 1884, which denied a motion for a new trial and ordered judgment on a verdict directed by the court. (Reported below 33 Hun, 589.)

This action was brought to recover damages alleged to have been sustained by plaintiff in consequence of the wrongful issue by defendant, through its local freight agent at Batavia, of two bills of lading. The recital in one was as follows: "Received from F. C. Williams the following articles (contents unknown) in apparent good order, viz., thirty-five barrels of beans." The recital in the other was the same, save that the articles described were "thirty barrels of beans." The consignee named was "I. T. Comstock, New York."

The material facts are stated in the opinion.

E. C. Sprague for appellant. A shipping receipt, like those in question, from which the words "or order or assigns" are omitted, is not a negotiable instrument within the meaning of the law merchant. (Hutchinson on Carriers, § 122; Daniels on Neg. Insts., §§ 1729, 1730, 1733; 1 Smith's Lead. Cases, 859, 896; *Barnard v. Campbell*, 55 N. Y. 461; *Brower v. Peabody*, 13 id. 121; *Henderson v. The Comptoir, etc.*, L. R., 5 P. C. 253; 10 Alb. L. J. 104; *Mechanics' B'k v. N. Y. & N. H. R. R. Co.*, 3 Kern. 599, 629; *Griswold v. Haven*, 25 N. Y. 602, 604; *Dows v. Perrin*, 16 N. Y. 325; *Commercial B'k v. Colt*, 15 Barb. 506; *Bush v. Lathrop*, 22 N. Y. 535; *Davis v. Beekstein*, 69 id. 442; *Trustees Union College v. Wheeler*, 61 id. 88; *Elliott v. Armstrong*, 2 Blackf. 212; *Hazard v. Fiske*, 83 N. Y. 287; *Wilcox v. Howell*, 44 id. 298, 402; *The Idaho*, 93 U. S. 575; *Shaw v. R. R. Co.*, 101

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N. Y. 557, 565.) Weiss, the shipping agent, had neither real nor apparent authority to issue receipts for goods not received for transportation, and the defendant is not estopped to deny that he had such authority. (*Robinson v. R. R. Co.*, 9 Fed. Rep. 129, 137; *Western B'k, Scotland, v. Addis*, L. R., 1 S. C. App. 146; *Mechanics' B'k v. N. Y. & N. H. R. R. Co.*, 3 Kern. 635.) The defendant is not estopped to deny that it received the goods in question or that it is liable for the loss sustained by the plaintiff. (*Griswold v. Haven*, 25 N. Y. 602, 607, 608; *Daniels on Neg. Insts.*, § 1729; *Sears v. Wingate*, 3 Allen, 402; *R. R. Co. v. Howard*, 13 How. [U. S.] 301; *Richardson v. Boston*, 19 id. 263; *Griffin v. R. R. Co.*, 1 West. L. Monthly, 31; *Maguire v. Selden*, 103 N. Y. 642; *Mayenborg v. Haynes*, 60 id. 675; *Farmers, etc., B'k v. Bank*, 16 id. 137, 141; *Mechanics' B'k v. N. Y. & N. H. R. R. Co.*, 3 Kern. 638; *Reeves v. Kimball*, 40 N. Y. 311; *Coke Litt.* [a] 227; *Com. Dig.* "Estoppel;" *Bacon's Abr.* "Estoppel;" *Grant v. Coal Co.*, 93 U. S. 326; *Shaw v. R. R. Co.*, 101 U. S. 565; *In re Jewett*, 7 Bliss, 328; *Miller v. R. R. Co.*, 90 N. Y. 430; *Abbe v. Eaton*, 51 id. 410; *Clark v. Barnwell*, 12 How. 283; *Nelson v. Stephenson*, 5 Duer, 538; *Hoffman v. Bank*, 12 Wall. 181, 190; *Robinson v. R. R. Co.*, 9 Fed. Rep. 129, 135; *Barnard v. Campbell*, 55 N. Y. 462; *Pollard v. Vinton*, 105 U. S. 7; *Myers v. Peck*, 28 N. Y. 590; *Mullalien v. Hodgson*, 16 Q. B. 689.) The authority of the agent being dependent upon the delivery of the property as a condition precedent, and there being no pretense that his authority was ever even apparently enlarged by any holding out or recognition of such acts, or that the defendant had been guilty of any negligence, the defendant cannot be held to be estopped, the agent having failed to establish the fact of such delivery. (*Robinson v. R. R. Co.*, 9 Fed. Rep. 129, 134; *Boucher v. Lawson*, T. Hardw. 200; *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 29 L. & Eq. 323; *Hubbersty v. Ward*, 8 Exch. 330; *Bradley v. Watling*, 7 Ad. & El. 29; *McLean v. Fleming*, L. R. 2 App. Cas. 128;

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Brown v. Coal Co., L. R. 10 C. P. 562; *Jessel v. Bath*, L. R. 2 Exch. 267; *Hutchinson on Carriers*, § 123; *Schooner Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 25; *Pollard v. Vinton*, 105 U. S. 7; *Lehman v. R. R. Co.*, 12 Fed. Rep. 595; *The Joseph Grant*, 1 Biss. 193; *R. R. Co. v. Wilkins*, 44 Md. 11; *Tiedman v. Knox*, 53 id. 615; *Fellows v. Powell*, 16 La. Ann. 316; *Adams v. Trent*, 19 id. 262; *Hunt v. R. R. Co.*, 29 id. 446; *Bank v. Lavielle*, 52 Mo. 380, *Mech. Bk. v. N. Y. & N. H. R. R. Co.*, 3 Kern. 599, 619, 629, 638; *Dows v. Perrin*, 16 N. Y. 325; *Farmer's, etc., Bk. v. Bank*, 16 id. 125, 134, 140; 14 id. 598, 602, 604, 623; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30, 73, 74, 91; *Griswold v. Haven*, 25 id. 595, 602, 604; *First Nat. Bk. v. Shaw*, 61 id. 283, 297; *Armour v. Mich. C. R. R. Co.*, 65 id. 111, 121; *McCombie v. Spader*, 1 Hun, 197; *Fishkill S. Instn. v. Bank*, 80 N. Y. 162; *Merchant's Bk. v. State Bk.*, 10 Wall. 604; *Farmer's Bk. v. Erie R. Co.*, 72 N. Y. 188; *Town of Springport v. Savings Bk.*, 75 id. 397, 406; *Craighead v. Peterson*, 72 id. 279; *Wilcox v. Howell*, 44 id. 398, 402; 13 id. 638; *Marvin v. Wilber*, 52 id. 270; *People v. Bk. N. America*, 75 id. 548; *Fowler v. Howe Machine Co.*, 20 Week. Dig. 521; *N. River Bk. v. Aymar*, 15 Barb. 262; *Atwood v. Munnings*, 1 Mann. & Ryl. 6.)

H. E. Sickels for respondent. The delivery of the bills of lading to the plaintiff with the drafts, under the circumstances disclosed, had the goods been shipped, was sufficient to vest all the interest Williams would have had in the property for the purpose of security for the payment of the drafts. (*Emery v. Irv. Nat. B'k*, 25 Ohio, 360; *Nat. B'k v. Dearborn*, 115 Mass. 219; *Dows v. Greene*, 24 N. Y. 638; *City B'k v. R. W. & O. R. R. Co.*, 44 id. 136; *Merch. B'k v. U. R. R. & T. Co.*, 69 id. 373.) A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts or omissions. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30;

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F. Sav'g Inst. v. Nat. B'k, 80 id. 162.) The defendant is estopped, as against the plaintiff, from now asserting the invalidity of the act of its agent, in issuing the bills of lading without the receipt of the goods. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Armour v. M. C. R. R. Co.*, 65 id. 111; *Brooke v. N. Y., L. E. & W. R. R. Co.*, Penn. Sup. Ct., Oct. 5, 1885; 32 Alb. Law Jour. 374.) It is not necessary, in order to create an estoppel, that representations apart from the bills of lading should have been made to the plaintiff, by or on behalf of the defendant, as no privity need be established, except such as is created by the unlawful act and the consequential injury. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 60; *E. C. & B. Co. v. Avery*, 83 id. 3.) The statement printed in the bills of lading "contents unknown" with the written statement following in one "35 barrels beans" and in the other "30 barrels beans" would not change the presumption that it was barrels of beans that had been received. (*Hatch v. Bayley*, 12 Cnsh. 27; *Shaw v. Gardner*, 12 Gray, 488.)

FINCH, J. It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. (*North River Bank v. Aymar*, 3 Hill, 262; *Griswold v. Haven*, 25 N. Y. 595, 601; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *Armour v. M. C. R. R. Co.*, 65 id. 111.) A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and

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functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiffs and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the bank may be dismissed with the observation that no privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. (*N. Y. & N. H. R. R. Co. v. Schuyler, supra.*)

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the

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carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable;" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. (*Mayenborg v. Haynes*, 50 N. Y. 675; *Maguire v. Selden*, 103 N. Y. 642.) Those were cases in which the representations made were not intended and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it, are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically

end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it, therefore, within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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DANIEL G. DORRANCE, Jr., Respondent, v. ROBERT J. DEAN et al., Appellants.

The factors' act (Chap. 179, Laws of 1830), was designed to protect persons dealing in good faith with the apparent owner of property; it does not apply where protection would secure to a wrong-doer the fruits of a fraud.

In an action for the conversion of a quantity of corn it appeared that plaintiff, who was the owner, consigned the corn to L. & Co., commission merchants, for sale. The latter delivered it to defendants, who advanced money on account of it. The court after charging that defendants could keep the corn as security for the money advanced, provided they did not at the time know that plaintiff was the owner, charged that if, on the other hand, they knew that L. & Co., were using plaintiff's property to raise money for themselves, they could not hold it, but stood, in L. & Co.'s place. *Held*, no error.

(Argued May 12, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the alleged conversion by defendants of a quantity of corn belonging to plaintiff.

The facts, so far as material, are stated in the opinion.

Edward S. Hatch for appellants. The plaintiff did not make out a case of conversion. (*Yeatman v. Sav. Inst.*, 95 U. S. 764; *Hull v. Carnley*, 11 N. Y. 501; *Goulet v. Asseler*, 22 id. 225; *Lewis v. Mott*, 36 id. 394, 401; *Talty v. Freedman's Sav'gs*, 93 U. S. 321, 324, 325.) The defendants took the title of the bank when they took up the notes. (*Stockbridge v. Schoonmaker*, 45 Barb. 100; *Evansville Bk. v. Kaufmann*, 93 N. Y. 273, 279; *Farmer's Bk. v. Lang*, 87 id. 209, 215; *Lewis v. Palmer*, 28 id. 271; *Havens v. Willis*, 190 id. 482, 490; *Townsend v. Whitney*, 75 id. 425, 430; *Commissioners v. Clark*, 91 U. S. 278, 286; *Cromwell v.*

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County, 96 id. 51, 59; 1 Daniel on Neg. Instr. [3d ed.], 753, § 803; *Bumpus v. Platner*, 1 John. Ch. 213; *Wood v. Chapin*, 13 N. Y. 509; *Griffith v. Griffith*, 9 Paige Ch. 315.)

H. Morrison for respondent. Where goods are hypothecated by factors, persons with whom the transaction takes place, in order to bring themselves within the law of 1830 (chap. 179, § 3), must show that the money was advanced on the faith of possession or *indicia* of title. (*First Nat. Bk. v. Shaw*, 64 N. Y. 283; *Walther v. Wetmore*, 1 E. D. Smith, 71.) The common law has been ameliorated as to its unfair protection of the rights of the owner of personal property at the expense of injustice to the honest purchaser or bailee in the enactment of what is known to the law merchant as the factor and agent acts. (4 Ga. 4 Ch. 83, 1823; 5 id. 94, 1825; 1 R. S. 762, tit. 5, § 3 [2d ed.] 1832, adopting statute of 1830.) Before the enactment of the Factor's Act, commonly called in 1830, no claim could have been predicated upon an hypothecation, notwithstanding the utmost good faith on the part of the pledgee. (*Rodriguez v. Heffernan*, 5 Johns. Ch. 417.) When property passes from the agent to the bailee, and he knows the owner, the principal liabilities and rights attach to the relation of the ownership. (*Morrison v. Currie*, 4 Duer. 82; Paley on Agency, 369; Smith's Mer. Law, 66, 78, 79; Story on Agency, 266.) The Factors' Act was intended for the protection of third parties, who, in good faith, and in ignorance of any defect of title advance money and incur obligations, upon the faith of merchandise and the apparent ownership thereof by factors or agents who have been entrusted by the owners with the possession of, or with the documentary evidence of the title to property. (Factors' Act, 2 R. S. 1168, § 2 [Banks' ed.]; *Howland v. Woodruff*, 60 N. Y. 73; 66 id. 113; *Covell v. Hill*, 6 id. 378; 3 Hun, 71.) Ignorance of the owner's title is an absolute element to protect the alleged purchaser or bailee. (*Howland v. Woodruff*, 60 N. Y. 73; *Covell v. Hill*, 6 id. 374; *Stevens v. Wilson*, 3 Denio, 472; 6 Hill, 312.) In trover for conversion

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of goods shipped, the damage is the value of goods at time and place of conversion with interest, etc. (*Covell v. Hill*, 6 N. Y. 374.)

DANFORTH, J. The plaintiff, being the owner of certain corn, alleged and proved that the defendants had converted it to their own use, to his damage \$2,829.60. The defendants at the time of the conversion, were warehousemen and bankers. They proved, in substance, that they received the corn from the firm of Littell & Co., commission merchants, advanced money to them on account of it, and insisted that they were entitled to hold the corn until this advance was repaid. It appeared that the plaintiff had consigned the corn to Littell & Co. for sale. They, therefore, had possession and were the apparent owners, and the trial judge charged the jury that the defendants could keep the corn as security for the money so advanced, provided they did not, at the time, know that the plaintiff was the owner of the corn; on the other hand, if they knew that Littell & Co. were using the plaintiff's property to raise money for themselves, then the defendants could not hold the corn, and stood in Littell & Co.'s place. To this part of the charge the defendants excepted. It presents the only point in the case, and, to sustain it, the appellant's rely upon the "Factors' Act" (Laws of 1830, chap. 179). That act was to protect persons dealing in good faith with the apparent owners of property, and has no possible application to a case where protection would secure to a wrong-doer the fruits of fraud.

Many other propositions have been argued for the appellants, but they are raised by no exception and are not warranted by any evidence to be found in the appeal book.

The trial judge in denying a new trial, and the General Term in affirming the judgment, properly disposed of the case.

The judgment and order appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

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WILLIAM H. SWIFT et al., Respondents, v. THE PACIFIC MAIL
STEAMSHIP COMPANY et al., Appellants.

Where a consignor of goods delivered to a common carrier for transportation, although not the general owner, has a lien upon or a special interest in the goods and makes the contract and pays the freight, he may bring an action for breach of the contract in his own name.

Where, therefore, the owners of whaling vessels were the consignors and consignees of a quantity of oil and paid the freight thereon, *held*, the fact that the seamen on the vessels had an interest in the proceeds of the sale of the oil did not make them necessary parties to an action against the carrier for breach of contract.

A corporation carrying over a portion of a continuous line of transportation, may contract to carry beyond the terminus of its route.

It may also contract to receive goods away from its terminus, to be transported to such terminus over the route of another carrier, and then to be forwarded over its route, when the making of such a contract is in the prosecution of and incidental to its corporate business.

It seems this right of a corporate carrier to go beyond its terminus to procure freight is not absolute and unqualified. It must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business.

Two corporations, each carrying over a portion of a continuous route, may enter into joint contracts for transportation.

Defendant, the P. M. S. Co., was organized to navigate steamships on the Pacific and Atlantic Oceans (Chap. 207, Laws of 1850.) Its line connected at Panama on the Pacific and at Aspinwall on the Atlantic with the road of defendant, the P. R. R. Co., which was operating under its charter a railroad between those places. In an action upon a joint contract made by the two corporations for the transportation of a quantity of oil from Panama to New York, *held*, that defendants had power to make the contract and were jointly liable for a breach thereof.

The parties made a special contract as to the transportation of the oil.

Two months after its delivery at Panama the common agent of the defendants here, executed bills of lading which were sent to plaintiffs, but were not received until after the oil had left Aspinwall. The contract, as set forth in the bills, was different from that actually made. *Held*, that defendants could not alter or abrogate the contract actually made, by issuing the bills of lading; and, in the absence of proof establishing that plaintiffs consented to accept the bills in place of the prior contract, the latter must control.

The damage complained of was caused by unjustifiable delay and carelessness while the oil was in the possession of the railroad company.

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Held, that conceding the contract for transportation was made with the steamship company alone, then defendants were severally liable, the railroad company as common carrier upon general principles, the steamship company under the special contract.

(Argued May 12, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor of plaintiffs entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought by the plaintiffs, as shippers, against the defendants, as common carriers, to recover damages for breach of a joint contract for the carriage of whale oil from Panama to New York.

The complaint alleged that the plaintiffs were copartners and that the defendants were corporations organized under the laws of this State; that the business of the Panama Railroad Company, among other things, was the transportation of freight from Panama by rail to Aspinwall, and there to deliver the same to the Pacific Mail Steamship Company, whose business it was, among other things, to transport the freight so received by vessel to New York; that the defendants, for a single price named, entered into a joint contract to carry the oil from Panama to New York; that they entered upon the performance of their contract in the months of January and February, 1873, and delivered a portion of the oil received by them from the plaintiffs, in the city of New York, about the 23d of April, 1873; that, owing to the negligence, delay and improper handling of the oil, and the casks containing the same, by the defendants, the oil was greatly damaged and injured, and a large part of it was lost by leakage while at Panama, on its way across the Isthmus, at Aspinwall, and also on the passage from Aspinwall to New York, and that by reason of negligence, improper conduct and mismanagement of the defendants, the plaintiffs suffered damages in the sum of \$20,000, besides interest. Each of the defendants, by

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a separate answer, among other things, denied the joint contract and the joint liability alleged in the complaint; alleged that the oil was delivered and carried under a special contract, printed and in writing, copies of which were delivered to plaintiffs, wherein the several rights and liabilities of plaintiffs and defendants, and each of them, with respect to plaintiffs and to each other, relative to the subject-matter of the complaint, were limited, defined and determined, and that its undertaking in regard to the oil was only under such contract, which it had fully performed; that it was not liable for losses accruing upon the route of the other defendant; and each defendant also alleged, as a separate defense, that there was a defect of parties plaintiff, and that several other persons named were then, and also at the time of the making of the contract and the transportation of the oil, jointly interested with the plaintiffs in the oil.

The further material facts are stated in the opinion.

George Hoadley for appellants. There was a defect of parties plaintiff, and the plaintiffs were not entitled to recover. (1 Greenleaf on Ev., §§ 56, 58; *Addington v. Magun*, 20 L. J. R. [N. S.] C. P. 82.) The Pacific Mail Steamship Company had no legal authority to enter into the alleged contract. (*Weed v. S. & S. R. Co.*, 19 Wend. 534; *Shouler on Bailments*, 336; *Perkins v. Portland, etc., R. Co.*, 47 Me. 573; *Muschamp v. L. & P. J. R. Co.*, 8 M. & W. 421, 430; *Converse v. N. & N. Y. T. Co.*, 33 Conn. 166; *Hood v. N. Y. & N. H. R. R. Co.*, 22 id. 1.) The supposed joint contract of the railway and steamship company, upon which the judgment below is founded, was not established. (*Lippincott v. Low*, 68 Pa. St. 314; *Ins. Co. v. Railroad Co.*, 104 U. S. 146; *Myrick v. Mich. C. R. R. Co.*, 107 id. 102; *Champion v. Bostwick*, 18 Wend. 175; *Pattison v. Blanchard*, 1 Seld. 186; *Merrick v. Gordon*, 20 N. Y. 93; *Milnor v. N. Y. & N. H. R. R. Co.*, 53 id. 363; *Briggs v. Vanderbilt*, 19 Barb. 222, 237; *Hunt v. N. Y. & E. R. Co.*, 1 Hilt, 228; *C. H. & D. R. Co. v.*

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Pontius, 19 Ohio St. 221; *Darling v. B. & W. R. R. Co.*, 11 Allen, 295; *Gass v. N. Y. P. & B. R. Co.*, 99 Mass. 220; *Burroughs v. N. & W. R. Co.*, 100 id. 26; *Aigen v. B. & Me. R. Co.*, 132 id. 423; *Block v. Fitch. R. Co.*, 139 id. 308; *H. S. R. Co. v. Trippe*, 42 Ark. 465; *Goldsmith v. Che. & Al. R. Co.*, 12 Mo. App. 479; *Snider v. A. Ex. Co.*, 63 id. 383; *Cit. Ins. Co. v. Kountze Line*, 4 Woods C. C. R. 268.) The only contract with the Pacific Mail Steamship Company proved in the case was created by the bills of lading. (*Shelton v. Mer. D. Tr. Co.*, 59 N. Y. 258. *Bishop v. Em. Tr. Co.*, 48 How. Pr. 119; *Oliver v. Mut. C. M. Ins. Co.*, 2 C. C. R. 277, 291; *B. & E. R. Co. v. Collins*, 7 H. L. C. 214.) It is immaterial that Mrs. Smith did not read the bills of lading. (Wood's Railway Law, 1577, 1578; *Bishop v. Em. Tr. Co.*, 48 How. Pr. 119; *Fibel v. Livingston*, 64 Barb. 179; *Geo. Ins. Co. v. M. & C. R. R. Co.*, 72 N. Y. 90; *Hills v. Syracuse, B. & N. Y. R. R. Co.*, 73 id. 351; *Madan v. Sherard*, 73 id. 334.) The oral communications did not constitute the contract. (*Long v. N. Y. C. R. R. Co.*, 50 N. Y. 77; 3 Wood's Railway Laws, 1577, n. 2; *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 id. 284; *McDonald v. W. R. Corp.*, 34 id. 501; *Maghee v. Camden, etc. R. R. Co.*, 45 id. 524; *Fairfax v. N. Y. C. & H. R. R. R. Co.*, 37 Supr. Ct. R. 530; *B'k Kent'y v. Adams Ex. Co.*, 93 U. S. 165; *Hollister v. Nowlen*, 19 Wend. 241.) The contract is void for indefiniteness. (*Burroughs v. Norwich & W. R. R. Co.*, 100 Mass. 26; *Myrick v. M. & C. R. R. Co.*, 107 U. S. 102.) In any event, the contract as to this defendant was, at most, to transport from Aspinwall to New York. (*Harris v. Grand T. R. R. Co.*, 5 Atlantic R. 305; *Washburne & Moen M'fg Co. v. Prov. & W. R. R. Co.*, 113 Mass. 490; *Nutting v. Conn. R. R. R. Co.*, 1 Gray, 502; *Hoagland v. Hannibal & St. J. R. R. Co.*, 39 Mo. 451; *Weil v. Mer. D. Tr. Co.*, 7 Daly, 456.) The bills of lading constitute the contract. (*Shelton v. Mer. D. Tr. Co.*, 59 N. Y. 258; *Bishop v. Em. Tr. Co.* 48 How. Pr. 119; *Ins. Co. v. Railroad Co.*, 104 U. S. 146; *Van Santvoordt v. St. John*, 6 Hill, 157; *Steward*

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v. *T. H. & I. R. R. Co.*, 3 Fed. R. 768; *Pem. Co. v. N. Y. C. R. R. Co.*, 104 Mass. 144; *W. St. L. & P. R. R. Co. v. Jaggerman*, 115 Ill. 407.) The bills of lading are established as the contract by the course of business between defendants. (*W & M. Man'fg Co. v. P & W. R. Co.*, 113 Mass. 493; *Darling v. B. & W. R. R. Corp.*, 11 Allen, 295; *Hinckley v. N. Y. C. & H. R. R. Co.*, 3 Supr. Ct. 281; *Blitz v. U. St'b Co.*, 51 Mich. 558.) In any event, the bills of lading are established as the contract of this defendant, The Pacific Mail Steamship Company. (*Hinckley v. N. Y. C. & H. R. R. Co.*, 3 Supr. Ct. 281; *Schiff v. N. Y. C. & H. R. R. Co.*, 52 How. Pr. 91; 16 Hun, 278.) The receipt without objection, and use made of the bills of lading, by Swift & Perry, and their agent Hunt, constitute a ratification of Crooker's assumption of agency for them, and a waiver of all objections thereto. (Story on Agency, § 242; *Codwise v. Hacker*, 1 Caines, 526; *Cairnes v. Bleecker*, 12 Johns. 300, 305; *Vianna v. Barclay*, 3 Cow. 281, 283; *Hazard v. Spears*, 4 Keyes, 469; 2 Abb. Ct. App. Dec. 353; *Gold M. Co. v. Nat. Bk.* 96 U. S. 640, 645; *Andrews v. Aetna Ins. Co.*, 92 N. Y. 596, 604; *Towles v. Stephenson*, 1 Johns, Ch. 110; *Armstrong v. Gilchrist*, 2 id. 424.) These acts also amount to a waiver of all objections to the bills of lading. (*Ger. Ins. Co. v. M. & C. R. R. Co.*, 72 N. Y. 90, 93; *Hill v. S. B. & N. Y. R. R. Co.*, 73 id. 351; *Long v. N. Y. C. R. R. Co.*, 50 id. 76.) If the letters and oral communications constituted a contract, they were never acted on. (*Ricketts v. B. & O. R. R. Co.*, 61 Barb. 18; 4 Lans. 446; 59 N. Y. 637; *C. & G't W. R. R. Co. v. Dane*, 43 id. 240, 243.)

William G. Choate for Panama Railroad Company, appellant. Though a railroad corporation may contract to carry beyond its own line, yet it requires an express contract so to bind it. Such contract is not to be inferred from its sharing in a through freight, nor from its receiving and transporting the goods over its line in the course of a continuous passage under an agreement for a through freight. (*Root v. R. R.*

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Co., 45 N. Y. 530; *Faulkner v. Hart*, 82 id. 422; *Condict v. R. R. Co.*, 54 id. 500.) A contract whereby the liability of the company is sought to be extended beyond its own line will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. (*Myrick v. R. R. Co.*, 107 U. S. 102.) The bills of lading were the only contracts between the parties. (*Shelton v. Despa ch Co.*, 59 N. Y. 258, 262; *Ger. Ins. Co. v. R. R. Co.*, 72 id. 92, 93; *Hill v. R. R. Co.*, 73 id. 351, 353; *Bishop v. Trans. Co.*, 48 How. Pr. 119.) There was nothing in the prior negotiations and understanding inconsistent with that provision of the bills of lading, stipulating for a restriction of liability of this defendant to its own line. This restriction was fairly within the contemplation of the parties, even if the parol agreement was not superseded by the bills of lading. (*McDonald v. R. R. Co.*, 34 N. Y. 501; *Isaacson v. R. R. Co.*, 94 id. 284; *Bank v. Ex. Co.*, 93 U. S. 165; *Oliver v. Ins. Co.*, 2 Curt. C. C. 291.) The persons named in the answers were shown to be interested in the oil and were necessary parties. (Code Civil Pro., § 449.)

Austen G. Fox for respondents. The uncontradicted evidence established a contract between the plaintiffs and the Pacific Mail Steamship Company to carry the oil through from Panama to New York, and it would have been proper for the court to direct a verdict in favor of the plaintiffs against that defendant. (*Mactier v. Frith*, 6 Wend. 139; *E. T. & G. R. R. Co. v. Montgomery*, 44 Ga. 278; *O. & L. R. R. Co. v. Pratt*, 22 Wall. 123; *Peck v. Vandermark*, 99 N. Y. 29; *Park v. Preston*, 22 W. Dig. 359.) For damages resulting from a default in the performance of this contract, the Pacific Mail Steamship Company is liable as a common carrier, even if it made the contract solely on its own behalf. (*Maghee v. C. & A. R. R. Co.*, 45 N. Y. 514, 518, 519; *Root v. G. W. R. R. Co.*, id. 524; *Quimby v. Vanderbilt*, 17 id. 306; *Burtis v. B. & S. L. R. Co.*, 24 id. 269; *Hart v. R. & S. R. R. Co.*, 8 id. 37; *Cary v. Ill. & Tol. R. R. Co.*, 29

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Barb. 35, 36; *Le Sage*, v. *Gt W. & D. & M. R. R. Co.*, 1 Daly, 306; *Schroeder* v. *H. R. R. Co.*, 5 Duer, 55.) Whether the charter of the Pacific Mail Steamship Company expressly authorizes this contract or not, the defense of "*ultra vires*" is not good. (*Bissell* v. *M. S. & M. I. R. R. Co.*, 22 N. Y. 258; 53 id. 367; 63 id. 69; *Buffett* v. *T. & B. R. R. Co.*, 40 id. 168, 172; *Weed* v. *S. & S. R. R. Co.*, 19 Wend. 534, 537; *B. & P. St. Co.*, v. *Bruce*, 54 Pa. St. 77; *Maghee* v. *C. & A. R. R. Co.*, 45 N. Y. 519.) The company having undertaken to execute the contract and collected the compensation agreed on, cannot now object that its officers had no authority to make the contract. (*Goodrich* v. *Thompson*, 4 Robt. 75; 44 N. Y. 324; *White* v. *A. & S. R. R. Co.*, 5 Lans. 475.) These facts are sufficient in law to sustain the finding of the jury that the contract was a joint contract. (*King* v. *Sarria*, 69 N. Y. 24; *Wylde* v. *Nor. R. R. Co.*, 53 id. 156; *Barton* v. *Wheeler*, 49 N. H. 9; *Case* v. *Baldwin*, 136 Mass. 90; *Gill* v. *Manchester R. Co.*, L. R., 8 Q. B. 186; *Hart* v. *R. & S. R. R. Co.*, 8 N. Y. 37; *Cobb* v. *Abbott*, 14 Pick. 289; *C. H. & D. R. R. Co.* v. *Spratt*, 2 Duval [Ky.], 4.) After the plaintiffs had parted with the oil, and the defendants had begun its transportation under the contract the jury had found was made, the defendants could not abrogate nor alter that contract by merely signing and mailing bills of lading which did not reach the plaintiffs until after much of the loss had occurred. (*Guillaume* v. *Gen'l Trans. Co.*, 100 N. Y. 491; *Bostwick* v. *B. & O. R. R. Co.*, 45 id. 712; *Coffin* v. *N. Y. C. R. R. Co.*, 64 Barb. 632; 56 N. Y. 632; *Strohm* v. *D. & M. R. Co.*, 21 Wis. 554; *Park* v. *Preston*, 22 W. Dig. 359; Lawson on Conts. of Carriers, §§ 114, 115; *Wheeler* v. *N. B. & C. R. R. Co.*, 115 U. S. 29.) The plaintiffs can maintain this action for damages for the breach of the contract to which they were parties. (*Sargent* v. *Morris*, 3 B. & Ald. 277; *Dunlap* v. *Lambert*, 6 Cl. & Fin. 600; *Blanchard* v. *Gray*, 8 Gray, 281; *Finn* v. *Western R. R. Co.*, 112 Mass. 524; *Nor. Pack. L. v. Shearer*, 61 Ill. 263; Hutch. on Carriers, § 723; *Considerant* v. *Brisbane*, 22 N. Y. 389; Bliss on

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Code Pleadings, § 59; *Allen v. Brown*, 44 N. Y. 328; *Meeker v. Calhorn*, id. 348; *Noe v. Christie*, 51 id. 270, 274; *Baxter v. Rodney*, 3 Pick. 435; *Grozier v. Atwood*, 4 id. 234; 23 id. 494, 495.) As the joint contract to carry through from Panama to New York made both the defendants liable as insurers, errors in the charge or in the admission of evidence, except as to the existence of the contract, are immaterial. (*Alden v. N. Y. C. R. R. Co.*, 26 N. Y. 102; *C. M. St. P. R. Co. v. Rose*, 112 U. S. 377.) Notwithstanding that the complaint states a joint contract the plaintiff is entitled to judgment against either defendant according as the evidence warrants a joint or only a several recovery. (*McIntosh v. Ensign*, 28 N. Y. 169; *Brumskill v. James*, 11 id. 294; *Montgomery Co. B'k v. Albany City B'k and B'k of State of N. Y.*, 7 id. 459, 465; *Loomis v. Rack*, 56 id. 462, 466.)

EARL, J. A point is made on behalf of the defendants that the plaintiffs cannot maintain this action on the ground that some of the seamen on the whaling vessels were to some extent joint owners with them of the oil. It is undoubtedly the general rule in this State that an action against a common carrier for the breach of his contract, or of his duty to carry must be brought in the name of the owner of the goods although the contract may have been made or the goods shipped by another. (*Greene v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 id. 36.) The rule has, however, been much questioned and has some exceptions. (*Blanchard v. Page*, 8 Gray, 281; *Finn v. Western Railroad Corporation* 112 Mass. 524; *Arbuckle v. Thompson*, 37 Penn. St. 170.) Where the consignor, although not the general owner, has a lien upon or a special interest in the goods, and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name in order that he may protect his rights. Here these plaintiffs made this contract in their own names, and with their own money paid the agreed freight,

and they were both consignors and consignees. It does not appear what ownership if any in the oil the seamen had, nor does it appear what the relations between the plaintiffs and them were. For aught that appears the plaintiffs were under a special duty to deliver this oil in the city of New York, and had a special interest in the whole of the oil to protect. As they were in control of the oil and made the contract for its transportation, being both consignors and consignees, in the absence of proof to the contrary, it must be assumed that they had sufficient title and right to maintain this action and enforce their contract with the defendants; and in so holding it is believed that we are in conflict with no authority.

But the evidence does not show that the seamen were joint owners with the plaintiffs of the oil. It was simply testified that "they were interested in the oil," and that evidence was not sufficient to establish that they were either partners or joint owners with the plaintiffs. It is more reasonable to suppose, from such evidence, that they were simply interested in the proceeds of the oil, and such is believed to be the common arrangement between the owners of whaling vessels and their seamen, when the latter have an interest in the product for the whaling voyage. (*Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 id. 234; *Bishop v. Shepherd*, 23 id. 492.) We are, therefore, of opinion that the seamen were not necessary parties to the action.

The Panama Railroad Company was organized to construct, maintain and operate a railroad across the Isthmus, from Panama to Aspinwall; and the Pacific Mail Steamship Company was organized to navigate steamships on the Pacific and Atlantic Oceans. (Laws of 1848, chap. 266, and Laws of 1850, chap. 207.) It is not disputed that the Panama Railroad Company could receive freight at Panama and contract to carry it beyond its terminus through to the city of New York, and that the Pacific Mail Steamship Company could receive freight at the city of New York, and contract to carry it to Aspinwall and thence by the railroad to Panama.

It is the well settled law in this State that a carrying cor-

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poration over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not *ultra vires*. (*Weed v. Saratoga & Schenectady R. R. Co.*, 19 Wend. 534; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156; *Root v. Great Western R. R. Co.*, 45 id. 524; *Condict v. Grand Trunk R. R. Co.*, 54 id. 500.) Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made, they contend that the Pacific Mail Steamship Company could not contract to receive goods away from its terminus and to transport them to such terminus over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the steamship company could receive goods at the city of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the city of New York. We see no reason for distinguishing between the two kinds of contracts, and for holding that the company could make the one kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter, or incident to such business, then when it procures freight at Panama for transportation to Aspinwall and thence to New York it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships, and the business it thus does at Panama and across the Isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Cannot a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods, why not a few miles? If it may have a depot for the receipt of freight one mile from its

terminus, why may it not have a depot fifteen or twenty miles therefrom, and transport the freight thence to its road by any means that it chooses to adopt? The Panama Railroad Company terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the steamship company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast, and instead of taking the passengers and freight at Aspinwall, why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business, and as incident thereto. Then again, if when the steamship company receives goods at New York under contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York, and so far as we have discovered, the power of corporations thus to become joint carriers has never been denied but has frequently been recognized. (*Aigen v. Boston & Maine R. R. Co.*, 132 Mass. 423; *Block v. Fitchburg R. R. Co.*, 139 id. 308; *Gass v. N. Y., Providence & Boston R. R. Co.*, 99 N. Y. 220; *Hot Springs R. R. Co. v. Trippe*, 42 Ark. 465; *Ins. Co. v. R. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Northern R. R. Co.*, *supra*; Hutchinson on Carriers, § 160.) The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to trans-

port them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are, it is not possible, in a general way to define. The New York Central and Hudson River Railroad Company, could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York, in order that it might secure the business of transporting such passengers and freight over its route to Buffalo; but it might run ferry boats from Staten Island, or from the New Jersey shore for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail Steamship Company, engaged in transportation upon both the Pacific and Atlantic Oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamships at Aspinwall, its main business being to take freight coming to it over that railroad.

The plaintiffs claim that the contract for the carriage of this oil was made in the city of New York between them and one Bellows, who was the vice-president and general agent of both defendants at that place, and that it was made by correspondence with Bellows and a personal interview had with him. On the other hand the defendants claim that the contract was contained in and evidenced by the bills of lading signed at Panama by one Corwin, who was the agent of both defendants at that point, which bills of lading expressly stipulated that the defendants should not be jointly liable for any loss or damage to the oil; that neither of them should be liable in any event for any loss or damage accruing upon the route of the other, nor accountable for leakage arising from improper or defective casks, nor for damages of any kind to articles perishable in their nature, nor for unavoidable detention and

delay. The trial judge submitted all the evidence bearing upon the contract to the jury, and instructed them to find whether it was made with Bellows as claimed by the plaintiffs, or whether it existed in the bills of lading as claimed by the defendants; and he also instructed them to find whether the contract was the joint contract of the defendants or the individual contract of the Pacific Mail Steamship Company; and he charged them that if they found the contract existed in the bills of lading they should render a verdict in favor of the defendants; but that if they found it was made with Bellows as claimed by the plaintiffs, and that it was the joint contract of both defendants, they should then render a verdict in favor of the plaintiffs against both defendants. The jury must, therefore, have found that the contract was made with Bellows as claimed by the plaintiffs, and that it was joint and the only further inquiry is whether there was any evidence to authorize their findings. * * *

The correspondence, together with what was said at the interview between Swift and Bellows, the joint agent of the defendants, made a special contract between the parties under which the plaintiffs were to deliver the oil at Panama, and the principals of Bellows were to receive the oil from plaintiffs' vessels, take it upon lighters to the docks and promptly carry it across the Isthmus to Aspinwall without delay, care for the oil upon the Isthmus and see to the cooping of the casks so that there would be no leakage there, and from Aspinwall transport it to the city of New York. And all this was to be done for the single price stipulated.

The contract, so far as it went, was complete. It was doubtless expected that bills of lading would be executed, but it could not have been expected that by them the contract so made should in any way be modified.

Under this contract, all the oil was delivered in January, 1873, from plaintiffs' vessels, and the only ground the defend-

* NOTE. — The omitted portion of the opinion is taken up with a discussion of the evidence as to the special contract claimed by plaintiffs.

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ants have for claiming that this was not the contract under which the oil was transported, is the fact that two months afterward, on the 27th of March, 1873, the common agent of the defendants executed bills of lading, which were sent to the plaintiffs and received by them April seventh. By some delay on the isthmus, the oil did not reach Aspinwall and was not delivered on the steamships until the second or third of April. After the receipt of the bills of lading, the plaintiffs did not discover the peculiar stipulations contained in them, at variance with the contract which they had previously made. Upon the landing of the oil in New York, the loss of the oil from leakage was discovered, and the plaintiffs paid the stipulated freight, giving notice of their claim. Under the evidence, the main features of which we have alluded to, it was certainly competent for the jury to find that the oil was parted with to the defendants for transportation, and that the defendants entered upon the transportation thereof under the contract claimed by the plaintiffs. The defendants could not, therefore, abrogate or alter that contract by merely signing and mailing bills of lading, which did not reach the plaintiffs until after the oil had left Aspinwall, and much, if not all, the loss had occurred. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must, therefore, control. (*Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712; *Guillaume v. Transportation Co.*, 100 N. Y. 491; *Wheeler v. N. B. & C. R. R. Co.*, 115 U. S. 29.)

It is clear that the plaintiffs did not understand that they were making several contracts for the transportation of their oil from Panama to New York, but they evidently supposed they were making a single contract with an agent who had authority to contract for the entire route. While the evidence is not conclusive, not even very satisfactory, that the defendants contracted jointly to carry this oil, yet we think there was enough to justify the jury in finding such a contract. Here was the steamship company engaged in transportation

both upon the Pacific and Atlantic Oceans, making contracts to carry from ports upon one ocean to ports upon the other, and such contracts could be performed only by carriage across the Isthmus over the Panama Railroad, and that railroad was engaged in transportation across the Isthmus of freight almost wholly to or from vessels of the steamship company. The two companies had common agents upon the Isthmus and in New York. Goods were transported in all cases for a single through freight from ports on the Pacific to ports on the Atlantic, and the freight money, after deducting compensation for lighterage, was equally divided between the companies, and the same person was vice-president of both companies.

Taking into consideration all these matters, the situation of the two companies and all the circumstances surrounding them, and the methods of their business as disclosed in the evidence, it is not an improbable nor an unjustifiable inference that they were jointly engaged in business and jointly contracted with the plaintiffs.

If the contract was made by the correspondence and personal interview with Bellows, as claimed by the plaintiffs and found by the jury, then, if the defendants are not jointly liable for plaintiffs' loss, they are severally liable. The whole loss was apparently primarily due to unexplained, unjustifiable delay and carelessness upon the Isthmus while the oil was in the possession of the railroad company. For that delay and loss it is liable as a common carrier upon general principles. The steamship company made a special contract to transport the oil without delay from Panama to New York, and to care for it and cooper the casks upon the Isthmus, and it is liable for the loss by virtue of that special contract. Therefore the defendants are either severally or jointly liable for the loss; and whether they shall be held for the loss jointly or severally cannot be very important to them, because it is quite certain from their relations to each other that they will be able to adjust between themselves in a satisfactory manner the joint recovery. The objection to the joint recovery, therefore, appears to be merely technical and should not prevail

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unless the judgment is plainly and clearly wrong, and such we think it is not.

A careful consideration of the whole case has, therefore, led us to the conclusion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE NORTHAMPTON NATIONAL BANK, Respondent, v. AMOS M.
KIDDER et al., Appellants.

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109 629

A purchaser for value of negotiable paper after maturity is not a *bona fide* purchaser to the extent of being protected in his purchase against the rightful owner, from whom it has been stolen, unless he has succeeded to the rights of a *bona fide* purchaser before maturity.

The burden is upon the purchaser in such case to show that he is, or has succeeded to the rights of, a *bona fide* purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue.

The O. & M. R. R. Co., issued certain mortgage bonds, on their face payable April 1, 1911, with interest semi-annually, upon presentation and surrender of the corresponding interest coupons attached to the bonds. Each bond contained a clause to the effect that, in case of non-payment, when demanded, of any installment of interest, and of its remaining unpaid for six months, or in case of default for six months in making any contribution to the sinking fund stipulated in the bond "the principal shall, without further demand or notice, become due or payable from and after the expiration of six months from the date of such default." In an action for the conversion of two of said bonds a statement of facts was agreed upon to the effect that the bonds in question were stolen from plaintiff in 1876 and were purchased by defendants in 1881; that no interest had been paid thereon for the years 1877, 1878 and 1879, "and the defaults have never been made good," nor had any contribution been made to the sinking fund; that a suit for the foreclosure of the mortgage "because of the above mentioned defaults" had been commenced, which was still pending; that a receiver of the company was appointed in 1876. *Held*, that the bonds at the time of defendants' purchase were overdue; and, as it did not appear they purchased of a *bona fide* holder who purchased before maturity, plaintiff was entitled to recover; that the language of the statement implied

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that a demand of payment of interest was made, or that the company had done something which dispensed with its necessity ; but, in any event, a default in making the stipulated payments into the sinking fund was clearly stated.

Also, *held*, that assuming default in the payments of interest or to the sinking fund would not render the principal of the bonds due, without some action on the part of the bondholders or the trustees under the mortgage showing an election to consider it due (as to which *quære*), the action to foreclose based upon both defaults showed such an election.

The plaintiff intervened and became a party plaintiff to the foreclosure suit; some portion of the past due coupons were paid in accordance with a provision contained in the mortgage in case of foreclosure. *Held*, that the acceptance of such payment by the plaintiffs in that action was not a waiver of the election to consider the bonds due.

Railway Co. v. Sprague (108 U. S. 756); *Morgan v. United States* (113 id. 476) distinguished.

(Argued May 18, 1887; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiff, entered upon an order made November 24, 1883, which directed judgment on a verdict directed by the court. (Reported below, 17 J. & S. 338.)

This action was brought to recover damages for the alleged conversion by defendants of two \$1,000 bonds belonging to plaintiff.

The material facts are stated in the opinion.

W. M. Safford for appellants. Price is the consideration in money paid for the purchase of a thing. (2 Bouv. L. Dict., 369; Worcester's Dict.) Sales imports the delivery of a commodity with its title in exchange for a price in current money. (2 Bouv. L. Dict., 492.) The General Term erred in holding that it rested upon defendants to show that the point made by plaintiff, that defendants did not give value for the bonds, was not made upon the trial. (*Hynes v. McDermott*, 82 N. Y. 41.) That question should be determined by the pleadings, by the whole record, by what transpired at the trial. (*McKenzie v. Ward*, 58 N. Y. 541; *People v.*

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Fields, id. 491.) The bonds were not due at the time of their purchase by the defendants. (*Morgan v. U. S.*, 113 U. S. 476; *Railroad Co. v. Sprague*, 103 id. 756.)

W. G. Peckham for respondent. Under a general denial in an answer, defendant has the right to give evidence controverting any facts necessary to be established by plaintiff, but not to prove a defense founded upon new matter. (*Weaver v. Barden*, 49 N. Y. 286.) In the United States the value of stolen articles can be recovered from any one who takes and converts them. We have no *market overt*. Negotiable paper in the hands of an innocent purchaser is an exception to this rule, provided the purchaser is a purchaser before maturity or dishonor, and had no notice of the robbery, and paid full value for the paper. (*Daniels on Neg. Instr.* § 1506; *Edwards on Neg. Instr.* § 884; *Arents v. Comm.*, 18 Grat. 751, *Belo v. Com'rs Forsyth Co.*, 76 N. C. 489; *Mayor, etc. v. City B'k*, 58 Ga. 584; *Hinckley v. Mer. Nat. B'k*, 131 Mass. 147; *Henderson v. Case*, 31 La. An. 216; 1 Dill. Mun. Corp. 553; *Andrews v. Pond*, 13 Pet. 79; *Harper v. Ely*, 56 Ill. 180; *Nickerson v. Ruger*, 46 Sup. Ct. 571; *Hinckley v. Un. P. R. R. Co.*, 129 Mass. 52; *People v. Supr. Ct. of City of N. Y.*, 19 Wend. 104; *Vermylye v. Ad. Ex. Co.*, 21 Wall. 138, 139, 144.) The acceptance of the equivalent of some part of the defaulted coupons was no proof of a waiver. (*Hinckley v. Mer. B'k*, 131 Mass. 147; *Elliott v. Curry*, 1 Phila. R. 281; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 164; *Moore v. Mayor, etc.*, 45 Mo. 204, 205; Such bonds are not negotiable. (*Chouteau v. Allen*, 70 Mo. 339.) The fact that back, defaulted coupons went with bonds, made the bonds dishonored or non-negotiable. (*Chouteau v. Allen*, 70 Mo. 339; *First Nat. B'k v. Co. Com.*, 14 Minn. 78.) Defendants were not entitled to protection as *bona fide* holders. (*Collins v. Gilbert*, 4 Otto, 755; *Abbott's Trial Ev.* 448, § 112; *First Nat. B'k v. Greene*, 43 N. Y. 298; *Kuhns v. Gettysburg Nat. B'k*, 68 Penn. 445; *Wylie v. Speyer*, 62 How. 118; *B'k of N. Am. v. Kirby*, 108 Mass. 497, 500; *Bigelow's*

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Bills and Notes, 539; *Porter v. Knapp*, 6 Lans. 127; *Hill v. Northrop*, 4 T. & C 122; *Phoenix Ins. Co. v. Church*, 81 N. Y. 221; *Wills v. Evans*, 8 N. Y. Week. Dig. 369; *Ocean B'k v. Carll*, 55 N. Y. 441; *Farmers' B'k v. Noxon*, 45 id. 762, 765; *Stevens v. Brennan*, 79 id. 258; *Comstock v. Hier*, 73 id. 269; *Millard v. Barton*, 13 R. I. 610; *Parsons v. Jackson*, 99 U. S. 434; *Kulb v. U. S.*, 18 Ct. of Cl. 560.) All presumptions are for the respondents. (*Oneida B'k v. Ontario B'k*, 21 N. Y. 490; *Williams v. Ins. Co.*, 1 Hilt. 350.)

PECKHAM, J. In the year 1871, the Ohio and Mississippi Railroad Company issued what was termed a second consolidated mortgage to secure the payment of a large amount of its bonds. The bonds on their face were payable on the 1st day of April, 1911, with interest in meantime semi-annually at the rate of seven per cent, on the first days of April and October in each year, until the principal was paid, upon the presentation and surrender to the company of the coupon or interest warrant attached for each installment of interest as it became due. Each bond contained this clause: "In case of the non-payment of the interest for any half year when demanded, and the same remaining unpaid for six months, and likewise in case of default for six months in the stipulated contribution to the sinking fund hereinafter referred to, the principal shall, without further demand or notice, become due and payable from and after the expiration of six months from the date of such default, with interest then accrued and in arrear." The bonds in referring to the mortgage which secured their payment, also contained a statement as follows: "And said mortgage also provides a sinking fund for the ultimate redemption of said bonds, commencing with payments into the sinking fund at the rate of \$20,000 a year, and so graded and regulated as to provide for taking up the whole amount of the bonds before their maturity."

By a written statement contained in the case and headed "facts" (the case containing none of the evidence given on the trial), it appears that the plaintiff was, on the 26th day of

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January, 1876, the owner of two \$1,000 second mortgage bonds of the issue above described, and on that day they were stolen from it by masked burglars. It further appears in the statement that no interest was paid on any of the second mortgage bonds for the years 1877, 1878 and April, 1879, nor was any contribution made to the sinking fund during the period from 1876 to December, 1882, inclusive, "and the defaults have never been made good for any of the payments which became due from 1876 to 1882." A foreclosure of the second consolidated mortgage (the statement continues), "because of the above mentioned defaults in the interest and sinking funds on the bonds in suit, was begun shortly before the appointment of receivers who were appointed on the 17th of November, 1876." At the time of the trial of this action (December, 1882), this foreclosure suit was still pending and had been from the time of its commencement. The defendants, on the 28th of April, 1881, had orders to buy \$2,000 of these bonds, and they purchased the bonds in question and acted through brokers in their purchase. Whether they paid a valuable consideration for the bonds or not is a disputed inference from the language used in the statement of facts, and the General Term held that the fact of such purchase for value did not appear, and upon that ground gave judgment for the plaintiff on a verdict directed for it at the Circuit, subject to the opinion of the General Term. Whether the court was right in that construction of the meaning of the language used is not important in the view we take of the case.

The bonds, when they were purchased by defendants in April, 1881, were overdue, and had thus ceased to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. (*Vermilye v. Adams Express Co.*, 21 Wall. 138, at 145; *Morgan v. United States*, 113 U. S. 476, 499; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147.) After maturity a purchaser for value is not a *bona fide* purchaser to the extent of being protected in his purchase (unless he succeeds to the rights of such a holder who became such before maturity), for the fact of non-pay-

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ment discredits the instrument and deprives it of any immunity which, before maturity, was secured to it in favor of a *bona fide* purchaser for value, without actual notice of any defect either in the obligation or the title.

The defendants' counsel, however, very strenuously denies the statement that the bonds were overdue when purchased. He says that no legal demand of the interest on the coupons was ever proved, and that by the terms of the bonds the interest must remain unpaid for six months after demand before the principal could become due. The language heretofore quoted, which was used in the statement, implies, however, that a demand was made, or that the company had done that which dispensed with its necessity.

In a legal document of such precision as a statement of facts should be, and is, where the vital point of the case rests upon the language used in this regard, the word "defaults" would never be used to describe a mere failure to pay money as interest on coupons which had not been presented, or any demand of payment made, or any action taken by the company to dispense with such demand. The word means, as thus used, the failure or default of the company to do that which it was under a legal obligation to do, and such default may have occurred by a refusal to pay any coupons upon the presentation of a part only, and by the action of the company in publicly announcing its inability to pay and its purpose to default as to all its legal obligations of this nature. This meaning of the word is rendered still plainer when, in the same statement, there is contained the further fact that the defaults have never been made good for *any* of the payments which became due from 1876 to 1882, and that the foreclosure of the second mortgage was commenced because of the defaults in the payment of the interest and of the amount due the sinking fund. It is idle to claim that such language would be used in regard to any fact other than a legal default consequent upon a proper demand, or else in regard to some action which dispensed with its necessity and was equivalent to a refusal to pay upon demand. Under no other circum-

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stances could it be justly or truly said that the company had made any default in the full performance of all its obligations as to payments, and under no other circumstances would such a word be used in a legal document of this character.

Two cases were cited by the counsel for the appellants to show that a default in the payment of interest did not make the bonds overdue. They were *Railway Company v. Sprague* (103 U. S. 756) and *Morgan et al. v. United States* (113 id. 476). Both of these cases have been already cited upon another proposition. Neither of them sustains this claim. In the first the condition was that the principal of the bond should become due if an installment of interest due should remain unpaid for six months after a demand should be made for the payment of the same. There was no evidence that any demand had ever been made, and it was not stated that the company had made any default in the payment of interest, and the court held that the mere presence on the bond of a past due and unpaid coupon was not evidence of a default. In regard to such coupons, the court said: "Coupons are separable obligations for the interest payable on demand. It constantly arises that they are not demanded for weeks and months, and sometimes years, after they are due. As they bear interest after maturity, it will frequently happen that the owner of a bond who holds it as an investment will keep the coupon for the same purpose." In the present case the statement that there had been a default, for which a foreclosure was commenced and receivers appointed, is, as has been said, equivalent to a statement that the company had been guilty of such a violation of the stipulations of the bond as made the principal due at once.

In the second case the court held that a so-called five-twenty government bond which had been called for payment after the lapse of five years, and a day named for its payment, after which interest would cease, was not an overdue bond; that the penalty for the non-presentment for payment by the day appointed was only the loss of interest from that time, and that the bond was not overdue within the principle per-

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mitting inquiry regarding overdue paper as to its origin or title in the hands of a *bona fide* purchaser for value, and without actual notice until after the lapse of the twenty years named in the bond for its unconditional payment. It was stated that there was a distinction to be observed between a bond which was redeemable after five and within twenty years, at the discretion of the government, and one which was payable absolutely at a certain time, and that in the case then before the court the only penalty prescribed for the non-presentment for payment on or before the day named in the call was the loss of future interest. In no other way was the original contract altered, and no other disability was imposed upon the holder, nor any other immunity taken from him, and the bond continued to stand upon its statutory basis as a bond redeemable at the treasury on demand, without interest after the maturity of the call, payable according to its original terms, and not overdue in the commercial sense till after the day of unconditional payment.

In the case at bar when the defaults had occurred, and the condition of the bond had therefore attached, the principal, by the very terms of the bond, became due at once.

Again, there can be no doubt as to there having been a default arising from the non-payment of the promised amounts into the sinking fund as provided for in the bonds. This failure is stated in plain language in the case. It cannot even be argued here (assuming the argument would be sound, which we do not decide) that the mere failure to pay, either the interest or the promised amount into the sinking fund, would not in and of itself, render the principal of the bonds due without some action looking to that end on the part of the bondholders or the trustees under the mortgage, because it was simply a privilege extended to them to so consider it at their election, which, until some action looking to its enforcement should be taken on their part, rested in abeyance and might be waived. The answer is there was an election in this case. The action to foreclose the mortgage, based upon both these defaults, was such election, and the defend-

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ants, when they purchased the bonds, knew that the company was in the hands of receivers.

The case, therefore, stands in this condition: The plaintiff proved that in January, 1876, it was the owner of these bonds and at that time they were stolen from it by means of a burglary. The thief, of course, got no title to them. The ownership and the theft of the bonds having been proved (assuming them to be commercial paper), the *onus* was cast upon the defendants to show that they were, or had succeeded to the rights of *bona fide* holders. (*Bank of Cortland v. Green*, 43 N. Y. 298; *Farmers' Nat. Bk. v. Noxon*, 45 id. 762; *Bank of N. Y. v. Carll*, 55 id. 440; per CHURCH, Ch. J.) They were not *bona fide* holders for they purchased paper which was overdue at the time of their purchase, and, if it be conceded that purchasers of such paper can succeed to the rights of *bona fide* holders (See *Miller v. Talcott*, 54 N. Y. 114), yet there is no proof of that nature in this case, as there is no proof that any holder succeeding the thief acquired the bonds before their dishonor as overdue paper, and there is no presumption to be indulged in, in favor of defendants, that the thief negotiated the bonds before they became overdue. This precise question as to the presumption in said case has been thus decided in Massachusetts, and, as we believe, correctly. (*Hinckley v. Merchants' Nat. Bk.*, 131 Mass. 147.)

Lastly, we think there was no evidence of any legal waiver of the election to consider the principal of the bonds due. Some portion of past due coupons, it seems, was paid to the plaintiffs in the foreclosure suit (in which this plaintiff had intervened and become a party plaintiff), but it seems that it was paid in accordance with a provision contained in the mortgage in case of foreclosure thereof, and evidently was a payment made in recognition of the legality of the foreclosure proceedings, and the receipt of the money was not in any manner intended as a waiver of the election once and conclusively made by the bondholders or their trustees. At all events there was no pretense of a waiver of the default as to the payment into the sinking fund.

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The defendants have failed to show any defense to plaintiffs demand, and the judgment in its favor must be affirmed, with costs.

All concur.

Judgment affirmed.

IRA SEYMOUR, Respondent, v. ALEXANDER MCKINSTRY, Jr.,
et al., Appellants.

Plaintiff conveyed to his son I., certain premises by deed with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and without the knowledge or consent of plaintiff, executed to defendant McK. a mortgage for \$5,000, the consideration therefor being partly certain claims held by McK. against I. and the balance a check payable to the order of I., which he transferred on the same day to plaintiff. McK. had knowledge at the time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was at the time of such assignment in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. Held, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and the burden of proving good faith in the transaction was upon him, and in the absence of such proof, plaintiff was entitled to the relief sought.

The lien of a vendor of real estate for unpaid purchase-money is good against the vendee and the whole world, unless waived or defeated by an alienation of the property by the vendee to a purchaser without notice.

In an action by the vendor to enforce his lien, as against a mortgage executed by the vendee, it is not necessary for the plaintiff to allege in

106	230
119	364

106	230
124	408

106	230
140	348

106	230
141	468

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his complaint that he has not waived his lien or that the defendant took with notice; waiver or want of notice must be set up in the answer and proved as a defense.

Where a claim can be sustained only upon the ground that the person asserting it is an innocent purchaser, he must positively deny notice of the equitable rights of another, although it be not charged.

Simpson v. Del Hoyo (94 N. Y. 189) distinguished.

(Argued May 6, 1887 ; decided June 7, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1885, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as vendor of real estate, to have an equitable prior lien declared in his favor as vendor for unpaid purchase-money.

The facts are sufficiently stated in the opinion.

Louis Marshall for appellant. The taking of any benefit under a deed, will or contract, or from the act of another after knowledge of its true character, whether it might have been avoided by reason of a fraud or other vitiating cause, is a ratification thereof, and estops the person receiving the benefit from denying the validity of the act. (*Allen v. Roosevelt*, 14 Wend. 100; *Masson v. Bovet*, 1 Denio. 69; 2 Sandf. Ch. 341; *Cobb v. Hatfield*, 46 N. Y. 533; *Brewer v. Sparrow*, 7 B. & C. 31; *Lythgoe v. Vernon*, 5 H. & N. 180; *Garret v. Goater*, 42 Penn. St. 143; *Mills v. Hoffman*, 92 N. Y. 181; *Rapalee v. Stewart*, 27 id. 310; *Patterson v. Pierronet*, 7 Watts, 337; *Fitzgerald v. School Com'rs*, 7 Humph. 224; *Wroten v. Armat*, 31 Gratt. [Va.] 228; *Baird v. Mayor, etc.*, 96 id. 589; *Schiffer v. Deitz*, 83 id. 300; *Vernol v. Vernol*, 63 id. 45; *Chipman v. Montgomery*, 63 id. 221; *Met. Life Ins. Co. v. Meeker*, 85 id. 614; *Mills v. Hoffman*, 92 N. Y. 181; *Rodermund v. Clark*, 46 id. 354; *Morris v. Rexford*, 18 id. 552; 2 Herman on Estoppel, 1157, 1164.) The plaintiff having voluntarily conferred upon Ira B. Seymour the apparent

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absolute ownership of the premises in question, and the apparent authority to mortgage the same, is estopped from asserting his lien as against Sabey, who is the *bona fide* purchaser of the mortgage of September 23, 1872. (*Moore v. Met. Nat. Bk.*, 55 N. Y. 41; *Bush v. Lathrop*, 22 id. 532; *Com. Bk. of Buffalo v. Kortright*, 22 Wend. 348; *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 323; *Fairbanks v. Sargent*, 9 N. E. Rep. 875, 876; *Greene v. Warnick*, 64 N. Y. 220; *Trustees Union College v. Wheeler*, 61 id. 86; *Weyh v. Boylan*, 85 id. 394; *First Nat. Bk. of Corry v. Stiles*, 22 Hun, 246, 247; *Dillaye v. Com. Bk. of Whitehall*, 51 id. 445; *Newton v. McLean*, 41 Barb. 285; *Simpson v. Del Hoyo*, 94 N. Y. 189.) Irrespective of an estoppel, a purchaser in good faith for value is entitled to priority over a grantor's lien. (*Fisk v. Potter*, 2 Keyes, 64.) A mortgagee and the assignee of a mortgage are purchasers within the meaning of the recording act (*Van Keuren v. Corkins*, 66 N. Y. 77; *Westbrook v. Gleason*, 79 id. 23; *Decker v. Boice*, 83 id. 215; *Brewster v. Carnes*, 103 N. Y. 556.) The plaintiff is also estopped from asserting his lien against the defendant Sabey by reason of his silence when questioned by Sabey with reference to the genuineness and *bona fides* of the mortgage in question, and by his subsequent conduct. (*Watson's Ex'rs v. McLaren*, 19 Wend. 557; *Weyh v. Boylan*, 85 N. Y. 391; *Dezell v. Odell*, 3 Hill, 218; *Plumb v. Cattaraugus Ins. Co.*, 18 id. 393; *Brown v. Bowen*, 30 id. 519; *Finnegan v. Carreher*, 47 id. 493; *Voorhis v. Olmstead*, 66 id. 113; 6 Barb. 613; 18 id. 334; *Lee v. Kirkpatrick*, 1 McCarter Ch. [N. J.] 264; *Knight v. Wiffen*, L. R. 5 Q. B. 660; *Cont. Nat. Bk. v. Nat. Bk. of Commonwealth*, 50 N. Y. 575; *Voorhis v. Olmstead*, 66 id. 113.) By accepting the check for \$2,100.37, and the transfer of Ira B. Seymour's interest in the premises situated on the rear of 83 and 85 Genesee street, by going on and completing his bargain with Ira B. Seymour, by accepting a mortgage for \$3,000 agreed to be given to Lucy Seymour, and by omitting to take any action to enforce the alleged lien before Ira B. Seymour

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absconded or until more than three years after the right accrued, the plaintiff waived his pretended grantor's lien. (*Fisk v. Potter*, 2 Keyes, 64; *Cort v. Fougere*, 36 Barb. 195; *Shirley v. Congress Sugar Refinery*, 2 Edw. Ch. 505; *Vail v. Foster*, 4 Comst. 312; *Fish v. Howland*, 1 Paige, 20; *Hare v. Van Deusen*, 32 Barb. 92.) The defendant Sabey being the purchaser in good faith of the mortgage of September 23, 1872, and for a valuable consideration, without notice of the plaintiff's pretended lien, is entitled to priority over such lien. (*Fisk v. Potter*, 2 Keyes, 64; *Bayley v. Greenleaf*, 7 Wheaton, 46; *Fish v. Howland*, 1 Paige, 20; *Shirley v. Congress Sugar Refinery*, 2 Edw. Ch. 505; *Sperry v. Short*, 90 N. Y. 542 543; *Howlett v. Whiffle*, 58 Barb. 224.)

M. M. Waters for respondent. The lien of the plaintiff for the purchase money, as between him and Ira B. Seymour, attached as matter of law under the rule that "in the absence of an agreement, express or implied to the contrary, the vendor of lands has a lien on them for the unpaid purchase-money. (Boone's Law of Real Property, § 393.) The mortgage to Alexander McKinstry attached only to that interest which rested in Ira B., under the conditional sale which was only in part performed. (*Dusenbury v. Hulbert*, 59 N. Y. 451; Boone's Law of Real Property, § 393.) The plaintiff, under the arrangement or contract of which his deed was merely a part performance, never parted with that interest in his land which is represented by his claim for purchase-money. (*Dusenbury v. Hulbert*, 59 N. Y. 541.) As the deed made by plaintiff was only a partial execution of the conditional sale, and as plaintiff did not surrender possession of the premises to the vendee, the plaintiff's possession was ample notice to Sabey of the plaintiff's equity. (*Spafford v. Manning*, 6 Paige, 383; *Trustees of Union College v. Wheeler*, 61 N. Y. 88.) The purchaser of a non-negotiable chose in action, secured by mortgage, takes it subject to the latent equities not only of the mortgagor, but of third persons. (*Trustees of Union College v. Wheeler*, 61

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N. Y. 83, 114, 115; *Shaffer v. Reilley*, 50 N. Y. 61.) As the mortgagor had neither property nor possession of the real estate, and the mortgagee took the mortgage with notice, the mortgage attached only to the interest which the mortgagor had, and as defendant is only the purchaser of the chose in action he must abide by the title of his assignor, even though he should be deemed a *bona fide* purchaser for value without notice. (*Patten v. McLean*, 15 B. Monroe, 555; *Coggill v. Hartford & New Haven R. R. Co.*, 3 Gray, 545; *Sargent v. Metcalf*, 5 id. 306; *Deshen v. Bigelow*, 8 Gray, 159; *Copeland v. Basquet*, 4 Washington C. C. R. 558; *Herring v. Willard*, 2 Sandf. 418; *Rawles v. Deshler*, 29 How. 66, 73.) The recording act does not apply, for the reason that defendants seek to make title upon the basis of plaintiff's prior title, and only through a subsequent title, which depends solely upon estoppel as a conveyance. (*Dusenbury v. Hulbert*, 55 N. Y. 541.) A receipt of part of the purchase-price of the land is no waiver of the vendor's lien for the balance. (Boone's Law of Real Property, § 394.) As between the plaintiff in the action and his son, the defendant, Ira B. Seymour, the plaintiff had an equitable lien for that part of the purchase-money remaining unpaid. (Willard's Eq. Juris. 443, 124; 2 Story's Eq. Juris. §§ 739, 1217, 1218, 1219, 1224; *Fish v. Howland*, 1 Paige, 20, 24; *Garson v. Green*, 1 Johns. Ch. 308; *Hare v. Van Deusen*, 32 Barb. 92; *Mills v. Bliss*, 55 N. Y. 139; *Auburn v. Settle*, 3 N. Y. S. C. R. [T. & C.] 261; *Warren v. Fenn*, 28 Barb. 333; *Dubois v. Hull*, 43 Barb. 26.) The defendant McKinstry acquired under his mortgage no greater right in the premises than was possessed by Ira B. Seymour, and this was subject to the equitable lien of his vendor (the plaintiff) for the unpaid purchase-money. (*Hallock v. Smith*, 3 Barb. 267, 272; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Perry on Trusts*, § 221; *Lewin on Trusts*, 198, 615, 616; *Seymour v. Wilson*, 19 N. Y. 417; *Bush v. Lathrop*, 22 id. 535, 538, 539; 2 Story's Eq. Juris., § 1502; 1 id. § 416; 10 Pet. 210, 211; 3 Sug. on Vendors, 488-496; *Deming v. Smith*, 3 Johns. Ch. 345; *Jewett v. Palmer*, 7 id. 65; *Gallatin v.*

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Cunningham, 8 Cow. 361; Story Eq. Plead., § 805; Hill on Trustees, 512; 1 Daniels Ch. Pr. [4 Am. ed.] 677; 1 Vernon, 246; 16 Vesey, Jr., 249; 3 Madd. Ch. Rep., 488; 4 Sandf. Ch., 97, 122; 9 Bosw., 583, 588; *McKyring v. Bull*, 16 N. Y. 399, 407, etc.; *Dennis v. Snell*, 54 Barb. 411.) The defendant Sabey, as the assignee of the mortgage from McKinstry, took no other or different rights in or to the mortgaged premises, or to the mortgage, than was possessed by his assignor. (*Greene v. Deal*, 64 N. Y. 320; *Schafer v. Reilly*, 50 id. 61; *Trustees of Union College v. Wheeler*, 61 id. 88; *Decker v. Boice*, 83 id. 215; *Dubois v. Hull*, 43 Barb. 26, 32; *Boyd v. Schlesinger*, 59 N. Y. 301; *Dusenbury v. Hulburt*, 58 id. 541; *Gallatin v. Cunningham*, 8 Cow. 361.) The rule that an assignee of a mortgage takes subject to the equities of third persons against the mortgagor, extends to the lien of a vendor for unpaid purchase-money. (Willard's Eq. Juris., 443, 124; 2 Keyes, 64, 71; *Shirley v. Congress Steam Heating Refinery*, 2 Edw. Ch. 505; Willard's Real Estate and Conveyances, 114; *Auburn v. Settle*, 3 N. Y. S. C. R. [T. & C.] 261; *In the Matter of Howe*, 1 Paige, 125; Lewin on Trusts, 615; 4 Kent's Comm. 154, (n.) 1; *Hallock v. Smity*, 3 Barb. 267, 272; *Dickerson v. Tillinghast*, 4 Paige Ch. 215; *Packard v. Arnold*, 6 Paige Ch. 310, 316.)

DANFORTH, J. The questions in this case are between the plaintiff, as an unpaid vendor of real estate, and the defendants, one as mortgagee and the other as assignee of the mortgage given by the vendee of the land. The controversy relates to the priority of their claims in those capacities. The court below decided in favor of the vendor's lien, and both defendants appeal.

It appeared that on and prior to the 7th of August, 1872, the title to and the possession of the premises in question were in the plaintiff, and he on that day conveyed them to his son, one Ira B. Seymour, by a deed, with warranty, for the price of \$9,100, of which all but \$5,000 was paid or satisfactorily arranged for; that, to enable Ira B. to raise that

sum, it was agreed between the plaintiff and Ira B. and the Equitable Life Insurance Society that Ira B. should execute to that company a first mortgage upon the premises, the amount of which should be paid by it directly to the plaintiff, and in reliance upon this arrangement he delivered the deed to Ira B. Seymour; that the company declined to make the loan, but, notwithstanding this, Ira B. caused the deed to be recorded, and on the twenty-third of September, without the knowledge or consent of the plaintiff, executed to the defendant McKinstry a mortgage of \$5,000, which was recorded on the same day; at the same time, and before he advanced any of the consideration of the mortgage, McKinstry, as the court and jury find, "had knowledge that the plaintiff claimed to be entitled to \$5,000 as part of the purchase-price of the premises therein described." The consideration for this mortgage was composed of a prior account of \$2,400 due from Ira B. Seymour to McKinstry, two judgments of \$300 against him, and \$2,100.37 in a check payable to the order of Ira B., which he on the same day indorsed and gave to the plaintiff. On the twenty-eighth of September McKinstry sold the mortgage to the defendant Sabey for the sum of \$5,000, and covenanted that there was unpaid and owing thereon the sum of \$5,000.

The court finds that "McKinstry before he assigned said mortgage, and before he advanced any part of its consideration, had notice of the equity of plaintiff arising from the non-payment of said purchase-money, and the defendant Sabey has not shown that he, when he took the assignment, did not have notice of plaintiff's equitable rights, or of the facts from which they arise," and, as matter of law "(1), the plaintiff has an equitable lien upon the premises for the balance due him for the purchase-price of the same; (2) that such equitable lien is superior to the lien of the \$5,000 mortgage given to said McKinstry, and assigned by him to said Sabey; (3) that the said Sabey, as assignee, has no better rights than his assignor McKinstry; (4) that the plaintiff is entitled to a decree establishing his equitable lien and declar-

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ing its priority, and that it is a first lien upon said premises, and directing a sale and foreclosure to enforce it." The judgment entered upon these findings has been affirmed by the General Term. We find no error in its conclusion.

So far as McKinstry is concerned it is entirely plain that he was not a *bona fide* incumbrancer, nor a purchaser for value beyond the sum of \$2,100.27 (*Ins. Co. v. Church*, 81 N. Y. 221), which he included in the check, and which was in fact indorsed by Ira B. to his father and paid to him. We may turn to *Sabey's Case* as presenting the only question which requires discussion. He is not found to have had notice of the plaintiff's equities, and is charged because (1) he did not show that he took without notice, and (2) because he could, in the nature of the transaction, have no better right than McKinstry. On the other hand, the contention made on his behalf on this appeal is that the plaintiff is estopped from asserting a lien as against Sabey because he voluntarily conferred upon Ira B. Seymour the apparent absolute ownership of the premises and the apparent authority to mortgage the same. The learned counsel for the appellant says there is no finding nor evidence that he was not a purchaser in good faith. As we have seen, the finding is that Sabey has not shown that he took without notice of the plaintiff's equitable rights as an unpaid vendor. If this will not sustain the judgment the appellant must succeed. His contention is that the precise question came up in *Simpson v. Del Hoyo* (94 N. Y. 189), and was answered in his favor by this court. There is this important difference: In the *Simpson Case* the party giving the mortgage was clothed not only with the record title to the land mortgaged, but was in possession of it under that title. Here possession was in the plaintiff, and an inquiry of him would have led to a true statement of the situation. It does not appear that he made such inquiry, nor is there the slightest evidence that he informed the plaintiff he was about to purchase the mortgage, or had been asked to do so. He himself says that he did not call upon the plaintiff directly, but on the twenty-eighth of

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September went by the plaintiff's place of business on his way to dinner, "passed the time of day with him," and says: "I asked where 93 East Genesee street" (the property in question) "was; he said just below, and I walked down towards it; he sort of followed me down; as we arrived there, I think I asked him what the property was worth; he said it had been appraised at \$10,000; he didn't consider it worth as much as that, between \$8,000 and \$9,000; I asked him if the mortgage in the hands of McKinstry, which his son had been to see me about, was a genuine *bona fide* mortgage; he said it was; I think that was all that was said; I don't know as I said anything that I was about to buy it; I don't know whether I did or not." Upon this testimony the counsel for Sabey asked the court to find that "the plaintiff is estopped from asserting his lien against the defendant, Sabey, by reason of his silence when questioned by Sabey with reference to the genuineness and *bona fides* of the mortgage of September, 23, 1872," and on his refusing to do so, excepted.

There are many circumstances in the case which would have warranted this refusal, but it is enough that the plaintiff flatly contradicted the statement of the defendant Sabey in every respect and particular, saying not only "I never saw him at the time the conversation is alleged to have taken place," but also, "I never had any conversation with him on the subject in any manner or form; I should certainly have remembered it if I had; I never had any conversation with him until this suit was commenced." The general testimony creates no surprise that the trial court did not credit the defendant in face of this contradiction. But as it was a question clearly within its province, and not within that of this court, the case must stand on its conclusion, and we have only to see whether the burden of alleging and proving innocence and good faith in the transaction was upon Sabey.

In the first place it was sufficient to put Sabey on inquiry that the property was in the actual possession of the plaintiff (*Cook v. Travis*, 20 N. Y. 400), and it was his duty to ascer-

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tain whether the plaintiff had any interest in it, and if so, to what extent, and for this purpose to have some communication with or from him (*Spofford v. Manning*, 6 Paige, 383). In the *Simpson* case (*supra*), attention is called to the fact that the mortgagor had possession as well as the apparent title, and that "she was in possession thereof at the time of the execution of the mortgage and of its assignment to the plaintiff," and in that case it was held sufficient if inquiry was made of the mortgagor. The reason of this limitation does not apply here. The plaintiff and not the mortgagor was in possession, and an inquiry of him would have led to a disclosure of the equities of the plaintiff.

There is a like or greater difference between the present case and the others cited by the appellant. *Fisk v. Potter* (2 Keyes, 64), was an action to enforce an equitable lien for the purchase-money against a subsequent purchaser under a mortgage executed by the vendee while in possession, and failed for that and other reasons which have no place in the record before us.

To meet the question of pleading and proof the appellant relies upon an averment in the answer that "he took the assignment of the mortgage upon the faith of plaintiff's admission that the mortgage was a valid mortgage, accompanied by a denial of knowledge or information of the alleged facts upon which the allegations of fraud or conspiracy are based." So far as reliance is placed upon the admission, it is the finding that none was made, and as a pleading the allegations are far short of the affirmative allegation which the law requires of one who is bound to allege that he took his security without notice. Moreover, he must both allege and prove it.

It is a defense founded upon new matter. The plaintiff's lien, as an unpaid vendor, is good against the vendee and against the whole world, unless waived by the vendor or defeated by an alienation of the property by the vendee to a purchaser without notice. (*Dusenbury v. Hulbert*, 59 N. Y. 541.) It was not necessary for the plaintiff in this case to allege that he had not waived his lien. The defendant might and did

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rely upon the plaintiff's waiver as a defense, and so pleaded and sought to prove it. He failed. That issue has been found against him. It was not necessary for the plaintiff to allege that the defendant Sabey took with notice, for his case was made out when his lien was established against his vendee and against McKinstry, unless Sabey was a *bona fide* purchaser from McKinstry, and if Sabey relied upon the fact that he took without notice, it should have been set up in the answer. (*Weaver v. Barden*, 49 N. Y. 286.)

The reason for this rule may be the same ascribed to the doctrine which requires the holder of a note, shown to have been fraudulently obtained, to prove under what circumstances and for what value he became the holder, viz.: That when there is fraud the presumption is that he who is guilty will part with the instrument for the purpose of enabling some third person to recover upon it, and such presumption operates against the holder and it devolves upon him to show affirmatively the facts essential to overcome that presumption and relieve himself from its effect. (*First Nat. Bk. v. Green*, 43 N. Y. 298, *Ocean Bk. v. Carll*, 55 id. 441; *Farmers' Bk. v. Noxon*, 45 id. 762.) So where the true owner sues to recover goods against a person claiming from the fraudulent vendee, the burden is upon the claimant to prove good faith and value. (*Stevens v. Brennan*, 79 N. Y. 258.) Indeed, the rule is entirely well settled that if a claim can be sustained only upon the ground that the person asserting it is an innocent *bona fide* purchaser, he must positively deny notice even though it be not charged. (*Denning v. Smith*, 3 John. Ch. 332.)

No error was committed therefore by the trial court in giving force to Sabey's omission to deny notice of plaintiff's rights and making it, in connection with other circumstances, a ground for postponing his mortgage to the plaintiff's lien for the unpaid purchase-money.

The other questions raised by the appellant relate to facts depending on evidence and have been found against him by the trial court and the General Term. They require no other

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discussion. Upon those findings the judgment is without error and should be affirmed.

All concur, except RUGER, Ch. J., not sitting.

Judgment affirmed.

On motion for reargument the following opinion was handed down :

DANFORTH, J. The defendant Sabey moves for a reargument. The concession in the pleadings was that on the 7th of August, 1872, the plaintiff was possessed in fee and the owner of the premises in question. The finding of the trial judge was, that on that day the plaintiff was the owner in fee and in possession of those premises, and his subsequent findings show a sale made to Ira B. Seymour and a delivery of the deed, not absolutely, but for the specific purpose of enabling him to raise the money by mortgage, to be executed to the insurance company for payment by them directly to the plaintiff. There is no finding or suggestion that the possession was changed, and no inference could be drawn that it was to be changed until after the inchoate arrangements were completed. An examination of the evidence justifies the finding of the trial judge in this respect. It was not excepted to, nor was he requested by the defendant to find that the possession, which was in the plaintiff August seventh, was at any time given to or taken by Ira B. Seymour.

The distinction between the *Del Hoyo* case (94 N. Y. 189, 193) and the present is obvious from other circumstances besides those briefly referred to upon the appeal. It was distinctly found in the *Del Hoyo* case that the fraudulent grantee not only took the deed "but took possession of the property under that conveyance and was in possession thereof at the time of the execution of the mortgage and its assignment to the plaintiff." The real owner was held to be estopped because she had clothed the mortgagor with the apparent title and possession, while as above stated there is no suggestion in the answer or findings or requests of counsel, or evidence in the case before us, that possession ever passed from Ira Sey-

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mour to his grantee. In the *Del Hoyo* case the rule is also applied, which throws the burden upon the assignee of proving how he came by the mortgage, that is, that he received it in good faith and for value, and it was said ~~that~~ "to give him the protection of the principles of law," there laid down, "the court must find not only that he purchased the mortgage for value, but that he purchased it innocently and in good faith."

It appeared in the case before us that McKinstry had from the beginning, and before the execution of the mortgage, full notice of the plaintiff's rights, and was so affected by it that in his hands the mortgage would be invalid as against the vendor's lien. As assignee Sabey is no better off than and is affected by all the equities which affect McKinstry. (*Decker v. Boice*, 83 N. Y. 215; *De Lancey v. Stearns*, 66 id. 157; *Schafer v. Reilly*, 50 id. 61; *Bush v. Lathrop*, 22 id. 535; *Davis v. Bechstein*, 69 id. 440.) As a purchaser his case under the recording act, if that act applies, might be better than that of McKinstry. If so, it would be because his assignment was not only recorded, but his legal title to the mortgage is based upon an actual pecuniary consideration, and upon the absence of notice. (*Decker v. Boice*, *supra*; 1 R. S. 756, § 7.) But the character of "purchaser" under the statute is an independent one, something different from that of assignee, and to avail the defendant it was necessary to plead and prove not only that he was a "purchaser" of record, but that he was a purchaser in good faith and for a valuable consideration. He was bound, therefore, to deny by his answer notice, although notice had not been charged, and to prove it. These matters were new and in defense. The duty of setting them up and the burden of proving them were, therefore, upon him, and because he did not so plead and had not proved those things, the judgment of the court below was sustained. No new rule was applied, but a very old one which requires a defendant who would avail himself of new matter as a defense, to aver and prove it, and which has been illustrated to the present day and through various systems of equitable procedure. *Grimstone v. Carter*, 3 Paige Ch. 421, 436, 437; *Jewett v.*

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Palmer, 7 Johns. Ch. 65; *Tuttle v. Jackson*; 6 Wend. 213, 227, 228; *Jackson v. McChesney*, 7 Cow. 360, 362; *Weaver v. Barden*, 49 N. Y. 286.)

No ground appears to warrant a reargument. The motion, therefore, should be denied.

All concur, except RUGER, Ch. J, not sitting.

Motion denied.

Distinguished 115-279

ISAAC W. BENNETT, Respondent, v. AGRICULTURAL INSURANCE COMPANY OF WATERTOWN, N. Y., Respondent.

An agent of an insurance company, who, with the knowledge of the company, had been in the habit of filling in applications for insurance, wrote in an application that the building on which insurance was desired was occupied as a residence by a tenant. The statement made by the applicant was that the building was unoccupied, but when occupied it was by a tenant. The applicant, supposing his statement to have been written in correctly, signed the application without noticing the misstatement. The policy contained a provision to the effect that if the building insured should cease to be occupied as a dwelling "or be so unoccupied at the time of effecting insurance and not so stated in the application," the policy shall be null and void "until the written consent of the company is obtained." In an action upon the policy, *held*, that the error of the agent could not be imputed to defendant; that the misstatement was as between the parties, that of the agent not of the plaintiff, and the fact of non-occupation must be deemed to have been stated in the application, and so, it did not constitute a breach of warranty.

After the policy was issued, a tenant took possession and occupied for a time and then moved out, leaving the house again unoccupied. It was claimed by defendant that treating the policy as a valid contract of insurance upon an unoccupied building, yet it being afterwards occupied, a discontinuance of the occupation brought the case within the first condition of the clause quoted and forfeited the policy. *Held*, untenable; that the condition applied only where the premises insured were occupied when the policy was issued; that when the insurance was upon unoccupied premises the insured had the right to leave them vacant all or any portion of the time.

On the trial the referee granted a motion on behalf of plaintiff to amend the application so as to make the statement therein conform to that actually made by plaintiff. *Held*, no error.

(Argued June 6, 1887; decided June 14, 1887.)

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made October 7, 1884, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was upon a policy of fire insurance. The material facts are stated in the opinion.

A. H. Sawyer for appellant. The plaintiff was not entitled to have the policy and application reformed. (*Price v. Lorillard Ins. Co.*, 55 N. Y. 240; *Meagan v. Hartf. Ins. Co.*, 12 Hun, 321; *Moran v. McLarty*, 75 N. Y. 25; *Paine v. Jones*, id. 593; *Casey v. Man. Ins. Co.*, 11 W. Dig. 198; *Bishop v. Clay Ins. Co.*, 49 Conn. 167; *Mead v. Westchester Ins. Co.*, 64 N. Y. 453; *Ford v. Joice*, 78 id. 618; *Bartholemcw v. Merc. Ins. Co.*, 34 Hun, 263; *Smith v. Knapp*, 18 W. Dig. 95.) Where it appears that the contract, as executed, is just the one one of the parties intended to make, and the one he understood the other intended to make, the court has no power to reform it. (*Paine v. Jones*, 75 N. Y. 593.) Where the relief sought is to reform a contract, that can only be granted by making the contract as both parties intended to make it. (*N. Y. Ice Co. v. N. W. Ins. Co.*, 31 Barb. 72; *Jackson v. Andrews*, 59 N. Y. 244, 247; *Ledyard v. Hartf. F. I. Co.*, 24 Wis. 497.) The failure of the plaintiff to acquaint himself with the statements in the application, after having had ample time and opportunity to do so, is such negligence as will prevent a reformation of the contract or a recovery thereon. (*Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; *Moran v. McLarty*, 75 id. 25; *Fowler v. Trull*, 1 Hun, 409; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Kirkland v. Dinsmore*, 62 id. 171; *Sus. Mut. Ins. Co. v. Swank*, 12 Ins. L. J. 625; *Penn. R. R. Co. v. Shay*, 3 W. Dig. 217; *Ervin v. N. Y. C. I. Co.*, 3 T. & C. 213.) Either the contract must stand as it is or then no contract of insurance was ever made, because the minds of the parties never met upon any other, and in either event there can be no recovery. (*Hughes v. Merc. Ins. Co.*, 55 N. Y. 265; *N. Y. Ice Co. v. N. W. Ins.*

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Co., 31 Barb. 72; *Le Roy v. Market Ins. Co.*, 45 N. Y. 82.) Under the plain provisions of the policy the dwelling-house insured ceased to be occupied, etc., some months prior to the fire, without consent, was so unoccupied at the time of the fire and that there can be no recovery in this action. (*Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; *Barry v. Prescott Ins. Co.*, 35 Hun, 601; *Paine v. Agri. Ins. Co.*, 5 T. & O. 619; *Sonniborn v. Manuf. Ins. Co.*, 15 Vroom. [N. J.] 220; *Bennett v. Agri. Ins. Co.*, 50 Conn. 420; *Corrigan v. Conn. Ins. Co.*, 122 Mass. 298; *Ashworth v. Builders' Ins. Co.*, 112 id. 422; *Cook v. Cont. Ins. Co.*, 70 Mo. 610; *Thayer v. Agri-Ins. Co.*, 5 Hun, 566; *Keith v. Quincy Ins. Co.*, 10 Allen, 228; *Franklin Sav'gs Inst. v. Cont. Ins. Co.*, 119 Mass. 240; *Am. Ins. Co. v. Padfield*, 78 Ill. 167; *Etna Ins. Co. v. Meyer*, 63 Ind. 238; *Dennison v. Phœnix Ins. Co.*, 52 Ia. 457.)

D. A. King for respondent. Defendant having treated Kellogg as its agent and allowed him to hold himself out to the world as such has not the right to deny it. (*N. R. B'k v. Aymer*, 3 Hill, 262; *Andrews v. Kneeland*, 6 Cow. 354, 357; *Farmers & Mech. B'k v. Butch. & Drov. B'k*, 16 N. Y. 125; *Nat. U. B'k v. Landon*, 66 Barb. 189; *Dunlap Paley on Agency*, 161; *Kelly v. Fall Brook C. Co.*, 4 Hun, 261; *Armour v. Mich. C. R. R. Co.*, 65 N. Y. 111; *Van Schoick v. Nrag. F. Ins. Co.*, 68 id. 434; *Davis v. Lamar Ins. Co.*, 18 Hun, 230, *Partridge v. Com. F. Ins. Co.*, 17 id. 95, 97.) An agent authorized to take applications for insurance should be deemed to be acting within the scope of his authority when he fills up the blank application, and if, by his fault or negligence, it contains a material misstatement not authorized by the instruction of the party who signs it, the wrong should be imputed to the company and not to the insured. (*Rowley v. Em. Ins. Co.*, 36 N. Y. 550, 553, 554; 4 Abb. Ct. App. Dec. 131; *Plumb v. Catt. Ins. Co.*, 18 N. Y. 392; *Owen v. Holland Purch. Ins. Co.*, 56 id. 571; *Mowery v. Rosendale*, 74 id. 360, 363, 364; *Taylor v. Mut. Ben. I. Co.*, 10 Hun, 52, 55; *Gates v. Penn. F. I. Co.*, id. 489; *Maher v. Hib. F. I. Co.*, 67 N. Y. 283; 6 Hun, 353; *Van*

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Schoick v. N.F. Ins. Co., 68 N. Y. 434.) Kellogg having, to the knowledge of the defendant, acted as agent, and defendant having employed him as such, and permitted him to sign his name as agent, the question is not wholly what power plaintiff intended to give him, but what power a third person, and particularly the person dealing with him, had a right to infer from his acts and those of the plaintiff, he possessed. (*Owen v. Cowley*, 36 N. Y. 604, 605; *Johnson v. Jones*, 4 Barb. 369; *Whitbeck v. Schuyler*, 31 How. 97; *Bridenbecker v. Lowell*, 32 Barb. 9, 18, *Davis v. Lamar I. Co.*, 18 Hun. 230; *Partridge v. Com. F. I. Co.*, 17 id. 95.) If the plaintiff answered the questions truly, as found by the referee, he is absolved from responsibility for errors or mistakes or fraud of the agent, and the insurers are estopped from denying their truth as given, or will be considered as waiving the condition. (*Flinn v. Eq. L. Ins. Co.*, 78 N. Y. 568, 577; *S. C.*, 9 W. Dig. 324; 15 Hun. 521; *Broadhead v. Lyc. F. Ins. Co.*, 14 id. 452, 455; *Reynolds v. Kenyon*, 43 Barb. 600, 602; *Treman v. Allen*, 15 Hun. 4; *Bodine v. Killeen*, 53 N. Y. 93; *Grattan v. Met. Ins. Co.*, 92 id. 274; 29 Weekly Underwriter, 353.) Warranty does not extend to known defects. Knowledge by or notice to the agent is knowledge of and notice to the principal, and with such knowledge the defendant cannot be permitted to say it never assumed the risk. (*Bennett v. Buchan*, 76 N. Y. 386; *Haight v. Cont. Ins. Co.*, 92 id. 51; *Woodruff v. Imp. F. Ins. Co.*, 83 id. 133, 140; *Van Schoick v. Nia. F. Ins. Co.*, 68 id. 434; *Aurora F. Ins. Co. v. Krainch*, 36 Mich. 289; *Williams v. Niag. F. Ins. Co.*, 50 Ia. 561; *Couch v. Roch. G. Ins. Co.*, 25 Hun. 469; *Bennett v. N. B. & Mer. Ins. Co.*, 81 N. Y. 273.) Knowledge of the agent was knowledge of the company, and the issuing of the policy with full knowledge that the building was unoccupied was a waiver of the conditions as to unoccupancy, or operated as an estoppel against the company. (*Broadhead v. Lycoming Ins. Co.*, 14 Hun. 452; *Van Schoick v. Niag. F. Ins. Co.*, 68 N. Y. 434; *Cone v. Niag. F. Ins. Co.*, 3 T. & C. 33; 60 N. Y. 619; *Couch v. Roch. G. Ins. Co.*, 25 Hun. 469;

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Woodruff v. Imp. Ins. Co., 83 N. Y. 133.) The defendant having put its refusal to pay expressly on the non-occupancy of the building, and alleged non-payment of premium, waived of any want of notice, or notice will be presumed. (*Hermann v. Niag. F. Ins. Co.*, 100 N. Y. 411; *Owen v. Far. Joint Stk Ins. Co.*, 57 Barb. 511; *Bumpstead v. Div. Mut. Ins. Co.*, 12 N. Y. 81, 97; *Craighton v. Agr. Ins. Co.*, 39 Hun, 319; *Brink v. Han. F. Ins. Co.*, 80 N. Y. 108; *Griffey v. N. Y. C. Ins. Co.*, 100 id. 417; *Boice v. Thames & Mersey Ins. Co.*, 38 Hun, 246, 250; *Post v. Aetna Ins. Co.*, 43 Barb. 351, 365, 370.) The plaintiff was entitled to a reformation of the application, which, by the terms of the policy, is made a part of it. (*Myer v. Lathrop*, 73 N. Y. 315; *Alb. City Savgs' Inst. v. Burdick*, 87 id. 40; *Kilmer v. Smith*, 77 id. 226; *Van Truyl v. Westchester Ins. Co.*, 55 id. 657; *Hay v. Star F. Ins. Co.*, 13 Hun, 496, 500.) The answer as written was, in legal contemplation, fraud. (*Bidwell v. Astor Ins. Co.*, 16 N. Y. 263; *Story's Eq. Jur.*, §§ 153, 154, 155, 158; *Rider v. Powell*, 28 N. Y. 310; *Maher v. Hib. Ins. Co.*, 67 id. 283; *Cone v. Niag. F. Ins. Co.*, 3 T. & C. 33; 60 N. Y. 619.) If there is any doubt as to the meaning of the words of the policy, that construction should be taken which is most unfavorable to the party using it, and should be rigidly applied. (*Edsal v. Camden & A. R. R. Co.*, 50 N. Y. 661; *Hermann v. Merch. Ins. Co.*, 81 id. 184, *Dilleber v. Home L. Ins. Co.*, 69 id. 256.) Where a breach of warranty is relied upon by an insurance company as a ground of forfeiture, the warranty is to be construed strictly against the company. (*Mowry v. W. Mut. L. I. Co.*, 7 Daly, 321; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, 414; *Livingston v. Stickles*, 7 Hill, 255.) Courts will strive to uphold the contract, and will construe conditions and provisions of a policy strictly against an underwriter, entailing a forfeiture or limiting liability. (*Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *McMaster v. Ins. Co. of N. A.*, 55 id. 222; 64 Barb. 536; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473.) Conditions and

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provisions in policies of insurance are to be construed strictly against the underwriters, and every intendment is to be made against a construction of a contract under which it would operate as a snare. (*Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405.) Where the language of the promisor may be understood in more senses than one, it is to be interpreted in the sense in which he has reason to suppose it was understood by the promisee. (*White v. Hoyt*, 73 N. Y. 505, 511; *Johnson v. Hathorn*, 2 Abb. App. Dec. 465, 468; *Potter v. Ontario Ins. Co.*, 5 Hill, 147; *Hoffman v. Aetna Ins. Co.*, *supra*; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417, 421.)

ANDREWS, J. The defense, based upon the statement in the application for insurance, that the house at the time of the application was occupied as a residence by a tenant, when in fact it was vacant and unoccupied, was met on the trial by evidence on the part of the plaintiff that the application was taken by Kellogg, the solicitor and agent of the defendant, who furnished the printed form of application used by the defendant, and propounded the questions to the plaintiff, and assumed to enter in writing in the blanks left for that purpose in the application, his answers, and that although Kellogg was correctly informed by the plaintiff that the house was unoccupied, but that when occupied it was occupied by a tenant or hired man, he untruly represented the plaintiff as answering that the house was occupied as a residence by a tenant, and that the plaintiff, supposing that the answers given by him to the questions were correctly entered, signed the application without noticing the misstatements. There was a conflict of evidence as to what occurred. The agent Kellogg testified that the answers were entered as given. The referee, however, found upon this issue in favor of the plaintiff, whose testimony was corroborated by several witnesses, and the finding, having been sustained by the General Term, is conclusive in this court. The agent Kellogg in taking the application was acting within the scope of his authority. He had been accustomed, with the knowledge of the defendant, to

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fill in the answers of applicants for insurance in the printed forms of application used by the company. Upon the case as it stands it must be assumed that he was informed by the plaintiff that the house was unoccupied. His error in incorrectly inserting the plaintiff's answers, cannot be imputed to the plaintiff or deprive him of the benefit of the policy. If the plaintiff, as found by the referee, answered the questions truly, he is absolved from responsibility. The misstatements in the application were, as between the parties, those of the defendant's agent, and not of the plaintiff, and did not constitute a breach of warranty by the assured. The authorities in this State are quite decisive in support of this view. (*Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Flynn v. Equitable Life Ins. Co.*, 78 id. 568; *Grattan v. Metropolitan Life Ins. Co.*, 80 id. 281.) The referee pursuant to the prayer of the complaint, reformed the application by inserting the answers as given by the plaintiff, as of the date of the application, and the evidence justified this relief. The defendant insists that treating the policy as having taken effect as a valid contract of insurance upon an unoccupied dwelling, there was a breach of a condition subsequent contained in the policy, which rendered it void. The policy was issued in August, 1876, for the term of three years. In April, 1878, a tenant was let into possession of the house, and occupied it until November, 1878, when he moved out and the house remained unoccupied from that time until the fire, July 17, 1879. The claim is that although the house was insured as unoccupied, yet as the plaintiff afterwards, during the life of the policy, occupied it for a time by a tenant, he could not thereafter discontinue the occupation during the subsequent life of the policy, and leave the premises vacant without forfeiting the insurance. The policy contains these among other conditions: "If the dwelling house or houses herereby insured, shall cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, or be

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so unoccupied at the time of effecting insurance, and not so stated in the application ; then, and in every such case, or in either of said events, ~~this~~ policy shall be null and void until the written consent of the company at the home office is obtained." The defendant bases his contention upon the first of the conditions above quoted. It is plain, we think, that this condition was intended to protect the company against an increase of risk, by leaving premises vacant which were occupied at the time the insurance was effected, and that it has no application to a risk taken on an unoccupied dwelling-house. The cost of insurance is regulated by the hazard, and when the company insure a vacant building, it charges an equivalent for its undertaking, and if the contract contains no provision limiting the vacancy, it may continue during the whole time of the policy and the premium presumably covers the risk. The condition in question imposes no obligation upon the owner of a dwelling-house, insured as vacant property, to occupy it for any period during the running of the policy, and it must be conceded that if the plaintiff had permitted the house to remain vacant during the whole time after the policy was issued, to the fire, there would have been no defense founded upon the condition in question. The claim is that the plaintiff, having voluntarily put a tenant in possession, although he was not bound to do so, could not, thereafter, terminate the tenancy without forfeiting the insurance. We think this construction of the condition is not admissible. The conditions which precede the one in question relate to acts or conditions occurring subsequent to the contract, which change the risk and increase the hazard. The condition in question is of the same character. It does not permit the owner of a dwelling-house insured as an occupied house, to increase the hazard by allowing it to become vacant, without the consent of the company. If it is unoccupied when insured, the fact must be stated in the application. The fact of non-occupation was stated in the application as reformed, and was known to the agent, who should have stated it in the applica-

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tion as originally furnished. As between the company and the plaintiff, it must be deemed to have been stated.

The question as to notice of loss was properly decided.

We think the judgment is right, and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

In the Matter of the Application of the FIRST PRESBYTERIAN SOCIETY OF THE TOWN OF BUFFALO for Leave to sell its Real Estate.

Where a conveyance of land to a religious corporation is absolute, without condition or reservation, it creates no trust beyond the duty imposed by law upon the corporation of using its property for the purposes contemplated in its creation. Such a trust is not fastened upon the land, but the corporation may, with the judicial consent, sell and convey a good title, the proceeds in such case taking the place of the land.

As to whether, under the acts of 1875 and 1876 (Chap. 79, Laws of 1875 and Chap. 110, Laws of 1876), and under the "rules and usages" of the Presbyterian church of the United States, a church belonging to that denomination can sell its real estate without the precedent consent of the Presbytery, *quære*.

The Presbytery gave its consent to such a sale, provided it was "authorized by a vote of the congregation in public meeting assembled."

The trustees of the church regularly called a meeting, at which of one hundred and thirty-seven members entitled to vote, eighty seven voted, and of these sixty-six voted in favor of a sale twenty-four of those who did not vote signed a paper approving a sale. *Held*, that, conceding the consent of the Presbytery was necessary, the condition imposed by it was complied with and the sale was authorized.

Also, *held*, in the absence of proof that any lawful vote was excluded or unlawful one admitted, the want of a proper register did not invalidate the vote taken.

This court has no authority to review the determination of the court below as to the propriety of such a sale.

(Argued June 7, 1887; decided June 14, 1887.)

APPEAL from order of the General Term of the Superior Court of Buffalo, made November 30, 1886, which affirmed

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an order of Special Term giving to the petitioner authority to sell its real estate.

The facts, so far as material, are stated in the opinion.

J. M. Humphrey for appellant. In construing a conveyance of real estate, the court must carry into effect the intent of the parties to it as shown by the whole instrument, and for that purpose may take into consideration the circumstances connected with the making of it, viz: The consideration; the objects and purposes for which it was made, as understood by the grantor and grantee. (1 Statutes at Large, 699, § 2; *Parkes v. Parkes*, 9 Paige, 116; *Woodworth v. Payne*, 74 N. Y. 196; 4 Kent Com. 124; *Wilson v. Troup*, 2 Cow. 228, 234; *French v. Carhart*, 1 N. Y. 102; *Whallon v. Kaufman*, 19 J. R. 104; *Green v. Cummings*, 23 N. Y. Week. Dig. 282; *Williams v. Williams*, 8 N. Y. 532; *Saunders v. Hanes*, 44 id. 353; Willard's Eq. Jur. 47, 298, 299, 567; *Cunningham v. Cassidy*, 17 N. Y. 276; *Woodworth v. Payne*, 74 id. 196.) The trustees took the property subject to the condition on which the grantor made the conveyance, and a departure, therefore, forfeits it. (*Robertson v. Bullion*, 11 N. Y. 265.) The courts must accept and enforce the decisions and usages of the church in all matters falling within the control of the church government and tribunals, and not allow the church property to be deviated from its trust. (*Wasson v. Jones*, 13 Wall. 680; 3 Ed. Ch. R. 55; 16 B. 241; 2 Potter on Corporations, § 577; 5 Am. R. 415; 53 N. H. 9.) The security of the real estate of all religious incorporations requires a strict adherence to the statute. (*M. A. Bap. Ch. v. Bap. Church in O. St.*, 46 N. Y. 143.) The power of the court to make an order permitting a sale depends upon the grounds stated and facts proved to the court in support thereof. (*M. A. Bap. Church v. Oliver St. Bap. Church*, 73 N. Y. 82.) The court cannot direct, as an independent proposition, the application of the proceeds of the sale of the real estate. Its only means of accomplishing that result is its power not to give its assent to

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a sale unless accompanied by such proposed application as shall seem to the court to be for the best interest of the society as an organization to continue for the purposes of its creation. (*Wheaton v. Gates*, 18 N. Y. 402; *The Elders v. Dutch Church Saugerties*, 16 Barb. 237.) Religious corporations are peculiarly subject to the control of courts of equity, their trustees are simply trustees of trustees, and, therefore, should be and are peculiarly subject to such control. (*Watkins v. Willcox*, 66 N. Y. 654; *Robertson v. Bullions*, 11 id. 243.)

Spencer Clinton for respondent. The order of the General Term is not appealable to this court, and the appeal should be dismissed. (Code of Civ. Pro. § 190; 2 R. S. [7th ed.] 11; *In re Marvin*, 11 N. Y. 276; *In re Dodd*, 27 id. 629; *Howell v. Mills*, 53 id. 323; *Livermore v. Bainbridge*, 56 id. 72; *In re Kings Co. El. R. Co.*, 82 id. 95.) The society has the title to the property and can sell it. (3 R. S. [7th ed.] 2181, § 55; *Wetmore v. Parker*, 52 N. Y. 450; *Erwin v. Hurd*, 13 Abb. [N. C.] 92; *Trustees v. Bly*, 73 N. Y. 323, 327; *Robertson v. Bullions*, 9 Barb. 64, 102.) The objection that there was no registry of voters, is not tenable. (3 R. S. [7th ed.] 1579, § 7; 32 How. Pr. 335.) The will of the majority of the society must govern. (*Petty v. Tooker*, 21 N. Y. 267; *Dutch Church, Saugerties*, 16 Barb. 237.)

FINCH, J. Upon the petition of a majority of those who constitute the religious corporation, known and organized as the First Presbyterian Church of the town of Buffalo, the Supreme Court has made an order consenting to a sale of its real estate, and directing the proceeds to be applied to the purpose of providing such other place of worship as the society shall direct. On the appeal from this order four different reasons are submitted as furnishing just cause for a reversal.

It is first claimed that the property cannot be sold, and a good title to it cannot be given, by reason of a trust imposed upon it. The deed to the corporation is absolute and without

condition or reservation. It created no trust beyond that general duty which the law puts upon a corporation of using its property for the purposes contemplated in its creation. That sort of trust is not one which fastens upon the land and inheres in the title, going with it where it passes or restraining alienation, but founded solely upon the corporate character of the grantee, and so justifying the control which the statute gives to the courts. The title of the church is an absolute fee which it can transmit to a vendee with the judicial consent and approval. When that occurs the proceeds take the place of the land and become the corporate property which the court, by a suitable direction, devotes to the proper uses and purposes which the corporation was framed to subserve, and to accomplish which its property was bestowed. It is in no respect diverted from the religious corporation, or even from its denominational uses, and so far as there is an element of trust a sale is consistent with and not destructive of it.

It is next said that the acts of 1875 and 1876 have so far changed the then existing law as to prevent a transfer of the property, except in accordance with the rules and usages of the denomination, and that those rules and usages require the precedent approval of the presbytery. Before those amendments were made it had been settled that a religious corporation held its temporalities wholly free from the domination of any ecclesiastical authority, and by a tenure so independent that it could change its creed and denominational character without losing its hold upon its property. Doubtless the acts of 1875 and 1876 were intended to restrain, in some degree, that sort of diversion of church property from one sect to another, for the provision is that the trustees shall hold and administer it according to the rules and usages of the denomination to which the church members of the corporation belong, and shall not divert it to the support of some other disconnected institution. It is not important to take the measure of this new legislation, or even to challenge the construction which the general assembly has apparently put upon one of its own canons, for no authority in the church has ever

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held or pretended that a society could not sell its land without the precedent consent of the presbytery. The interference of that body was sought by the minority of the society in the present case. The majority declined to appear or to recognize the authority invoked. The presbytery determined that it "was thus left to make up a deliverance by such light as it had," and decided two things, first, "that it is not certain that the sale and removal of the church would necessarily be attended with disastrous results if a large majority of the congregation should vote in favor of removal," and the presbytery "cannot, therefore, interfere to prevent a sale of the property," * * * but it would "advise the majority to proceed with caution and tenderness;" and, second, "that an application to the court for leave to sell without a previous vote of a majority of the society in favor of such action is not in accordance with Presbyterian usage," and that no further steps should be taken "unless authorized by a vote of the congregation in public meeting assembled."

Waiving, therefore, the interesting question whether the presbytery had jurisdiction at all, it is enough to say that it gave its consent to proceeding with the sale provided only that a majority of the congregation should so decide in public meeting assembled, and that the steps in that direction should be taken "with caution and tenderness." The majority took the advice if they did not concede the jurisdiction. The pending application to the court was withdrawn. The trustees called a meeting of the congregation to consider and decide the question of a sale. Notice of that meeting was read from the pulpit for three succeeding Sundays prior thereto. At the meeting two of the elders presided. The vote was by ballot, and the qualification of the voters that provided by statute. Of these there were 137 entitled to vote. Eighty-five votes were cast, of which sixty-six were in favor of sale and nineteen opposed. Fifty-two members of the society entitled to vote did not do so, but twenty-four of those signed a paper of approval produced with the petition to the court. It is upon that petition presented after the vote that the order

here assailed rests. It is entirely clear that in granting it no rule or usage of the Presbyterian denomination was violated, the presbytery itself having so determined.

But it is said, thirdly, that the vote was illegal for want of a proper register. There is no force in this objection for a very obvious reason. Full and formal notice of the meeting and its purpose was given as we have seen. Every one entitled to a vote had opportunity to offer it, and the case shows that but one vote offered was refused, and there is not a particle of evidence that such vote should have been received, nor a word of proof that any vote received should have been rejected. In such a case, the mode and manner of making the registry is of very little importance. It only becomes so when it excludes a lawful vote or admits an unlawful one. No such question is presented.

It is finally argued that the meditated sale is unwise and imprudent, and likely to bring disaster upon the church. That opens the merits of the controversy with which we can have no concern. The courts below have exercised their discretion upon the facts presented and, with their conclusion, we must be content. Undoubtedly, much may be said for and against the wisdom of the proposed sale and removal. Removing an old church has something of the peril of transplanting an old tree. It may take kindly to the new soil, or the roots may be so torn as never to heal; but the risk is with the majority of the society whose interests are immediately involved and whose judgment, fairly formed and ascertained, should prevail. Since we ought not to decide upon the merits, we shall not obtrude our advice.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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THE PEOPLE ex rel. JOHN McCABE, Respondent, v. THE
BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEW YORK,
Appellant.

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142	364

The provision of general orders No. 18 of the Board of Commissioners of the Fire department of the city of New York, series of 1881 (par. 5, § 3), which provides that every officer and member of the uniformed force of the department shall "be responsible for any want of judgment, skill * * * which may cause unnecessary loss of life, limb or property," refers to a loss which has actually resulted, not to one which might have happened.

Where, therefore, no actual loss has been occasioned by an act of a member of the force complained of, he cannot be held responsible under said provision.

Where the determination of an inferior tribunal, brought up for review by *certiorari*, has been reversed by the court granting the writ as against the weight of evidence, and the evidence is such that the court, guided by the rules governing it on application to set aside the verdict of a jury, would have power so to do, the decision is not reviewable here.

The provision of the Code of Civil Procedure (§ 2140), specifying the questions involving the merits which may be determined by the court on return to a writ of *certiorari*, has no application to a hearing on appeal to this court, and in no way enlarges its jurisdiction; it is confined in its operation to the court in which the hearing is originally had.

It seems that, in a case involving a plain violation of the well-known rules governing applications for a new trial on the ground that the verdict is against the weight of evidence, or where it can be seen that there was an abuse of the discretion of the court below in its decision on such a hearing, this court may review the decision.

(Argued June 7, 1887; decided June 21, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 2, 1887, which reversed, on *certiorari*, the proceedings of the defendant removing the relator from the office of second chief of the fire department of the city of New York and reinstated him in his office. (Reported below, 43 Hun, 554.)

The material facts are stated in the opinion.

David J. Dean and *Wm. L. Findley* for appellant. The fire commissioners had jurisdiction to make the order dismiss-

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ing the relator, and in their proceedings have complied with every condition prescribed by the statute which defines their powers. (Consolidation Act, § 440.) Under the statute it is the exclusive province of the commissioners, first, to determine whether the issue of the unnecessary order authorizes an inference of incapacity; secondly, to determine whether the facts proven justify and excuse the issue of the unnecessary order; thirdly, to fix the penalty. Any invasion of the power thus reserved to the commissioners by the court is a usurpation of power which the statute has not conferred upon the court. (*People ex rel. Hart v. Fire Com'rs*, 82 N. Y. 358; *People ex rel. Masterson v. Fire Com'rs*, 96 id. 644; *People ex rel. Folk v. B'd of Police*, 69 id. 411; 82 id. 255; *People ex rel. Conklin v. Fire Com'rs*, 40 Hun, 631; *People ex rel. Kent v. Fire Com'rs*, 100 N. Y. 82; *People ex rel. v. B'd of Police*, 39 id. 517.) It was not necessary to establish a defect of general capacity in the relator, but a defect of capacity for his particular office. (*People ex rel. Folk v. B'd of Police*, 69 N. Y. 408; *People ex rel. Hart v. Fire Com'rs*, 82 id. 358; *People ex rel. Masterson v. Fire Com'rs*, 96 id. 644.)

* *Elihu Root, Roswell D. Hatch and Geo. B. McCloskey* for respondent. The determination by the board of fire commissioners of the relator's guilt upon charges was subject to review by the General Term on *certiorari*. (Code of Civ. Pro., § 2140; *People ex rel. Dumahaut v. Fire Com'rs*, 96 N. Y. 672; *People ex rel. Munday v. Fire Com'rs*, 72 id. 445; *People ex rel. Mayor, etc., v. Nichols*, 79 id. 588.) The decision of the General Term, being on the facts, is not reviewable here. (*People ex rel. Murphy v. French, Com'rs, etc.*, 92 N. Y. 306, 310.)

PECKHAM, J. The relator was second assistant chief of the fire department of the city of New York. On the 14th of July, 1886, charges were preferred against him by the chief of the department, charging him first, with incapacity, in that being in command at a fire which occurred in Third

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avenue, at One Hundred and Twenty-fifth street, at or about 6.25 P. M. of July fifth of that year, he did unnecessarily send or cause to be sent at 7.25 P. M. the telegraphic signal known as the "simultaneous call" thereby summoning to the station 767 in Harlem, all of the fire extinguishing apparatus and uniformed force of the department then in quarters on Manhattan Island north of Fourteenth street, excepting engines 14 and 16 and the second section of engine company 26, thereby without due cause and reason uncovering and depriving of all fire extinguishing apparatus and seriously endangering life and property in a large and important section of the city during the celebration of Independence day when fires are invariably of very frequent occurrence, and when it was of the utmost importance that no part of the fire extinguishing apparatus should unnecessarily be out of quarters, and that he did thereby evince an incapacity or want of skill in performing the duties of second assistant chief of department in violation of section 440 of the New York city consolidation act of 1882.

The second charge was that he sent out such "simultaneous call" under the circumstances above detailed "without due cause and reason and for want of judgment or skill on his part, which *may have caused* unnecessary loss of life, limb or property, uncovering and depriving of all fire extinguishing apparatus and seriously endangering life and property in a large and important section," etc., as in first charge alleged.

The accused was duly served with a copy of the charges and cited to appear before the board at a certain time and place. Pursuant to such citation he did appear in person and by counsel, and after pleading not guilty to the charges, the trial was in due course proceeded with.

Witnesses were sworn and examined on the side of the prosecution and defense, and the testimony being closed, the board, after deliberation, and on the 21st of July, 1886, found the relator guilty of both charges and sentenced him to be dismissed from the force of the department, to take effect from 6 o'clock P. M. of that day.

The first charge it will be seen refers to the act of the relator as coming within section 440 of the consolidation act, which provides for the government and discipline of the fire department, and that it shall be such as the board may, from time to time, by rules, regulations and orders prescribe.

The section gives the board power, on conviction of a member of the force, of, among other things, incapacity * * * to punish the offending party by reprimand, forfeiting and withholding pay * * * or dismissal from the force.

The second charge is founded, in addition to the violation of the said section of the consolidation act, upon section 3, paragraph 5, of general orders No. 13, O. B. C., series of 1881, which provides that every officer and member of the uniformed force of the department shall *conform to the following rules* :

"3. Be responsible for any want of judgment, skill, neglect or failure which may cause unnecessary loss of life, limb or property."

There is no pretense of any evidence showing that any want of judgment, skill, neglect or failure of the relator did, as matter of fact, cause unnecessary or any loss of life, limb or property. Upon the proper construction of the language used in the rule above quoted, we agree with the learned General Term. The want of judgment or skill for which, under that rule, the officer must be responsible, is a want from which unnecessary loss of life, limb or property has resulted. In this case no loss at all resulted from any want of judgment or skill on his part. The General Term properly held, therefore, that there was no evidence whatever which sustained the conviction upon the second charge, so far as it alleged a violation of the rule of the board. The charge itself is not in accordance with the rule, for it alleges a responsibility for want of judgment, etc., which "*may have caused unnecessary loss*," while the rule is, "which may cause unnecessary loss," etc. The charge was in relation to a past act, and in using the words "may have caused," evidently meant that there was, at the time of the performance of the

act, a possibility of such loss occurring from such want of skill, although none in fact occurred. The rule itself is a general one, and provides for future contingencies, and uses language which plainly shows that it refers to those cases only where unnecessary loss of life or property actually resulted from the want of judgment or skill. After striking out any alleged violation of the rule in question, the two charges are substantially identical, and limit the accusation to a general charge of incapacity.

A large amount of evidence was taken, which, in relation to the actual facts, is not substantially contradictory. In the view we take of our power, it is, however, wholly unnecessary to enter at length upon a discussion as to what the evidence proves.

The charge of incapacity was confessedly based upon the one act embraced in the written charges of sending out, under the circumstances, the "simultaneous call." Prior to this time the relator had been regarded as a capable officer, fit, in the opinion of his chief, to be trusted with command at fires, and, in truth, he had been frequently so trusted, and no hint had ever been suggested of his unfitness for such command. In sending out the call, it is not pretended that he did otherwise than act, under an emergency, upon his best judgment, but in so doing, in the opinion of several of the witnesses, he very greatly erred and showed positive incapacity.

From the facts proved, there were inferences to be drawn as to whether or not he was incapable. Looking at all the evidence and taking all the facts into consideration, and drawing what it regarded as the natural and proper inference therefrom, the General Term came to the conclusion that such facts did not warrant the inference of incapacity, which the board of commissioners drew therefrom, and hence, as it had the right to do, it reversed the finding of the board on the facts and reinstated the relator. This right is given to that court by section 2140 of the Code, which provides for a review of the determination by common law *certiorari* by the court granting the writ, and upon the hearing on the

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return, that court may inquire, among other things, whether there was any competent proof of all the facts necessary to be proved, and if so (subdivision 5), "whether there was, upon all the evidence, such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming their existence, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence."

From the decision of the General Term, that court, it is plain, in reversing the decision of the board acted under the subdivision just quoted, of the section above referred to. The board of fire commissioners have appealed from this determination of the General Term and we are asked to review and reverse it.

We think we have no power to do so. The evidence taken in the proceedings is such that a court guided by the rules governing it on applications to set aside a verdict of a jury as against the weight of evidence, would have that power.

It is an application addressed to the sound discretion of the court, guided, of course, by well known legal principles, but still largely dependant upon its discretion and to be exercised upon a careful review of all the evidence, its legitimate bearing and the proper weight to be given it. Generally, in granting or refusing such application, no error of law is committed. If the evidence be of such a character as to call reasonably and properly for the exercise of this sound discretion of the tribunal issuing the writ, its decision either way will not be reviewed here unless our jurisdiction has been enlarged in common with that court, by the section of the Code above alluded to.

Prior to its adoption this court, in a series of decisions which somewhat amplified its jurisdiction in reviewing the determination of the other courts upon writs of *certiorari*, still confined its powers of review to the inquiry whether the tribunal making the determination had jurisdiction and whether there was any evidence tending to support its determination, and whether any rule of law, affecting the rights of the party,

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had been violated. Since the adoption of that section, many appeals have been brought here for review and the expressions of the judges as to the power of the court, have been quite uniform in opposition to any such jurisdiction as is now invoked, but yet, in most of them, the section in question has not been adverted to or brought to their attention, and there has been as yet no authoritative decision of the question with the section distinctly brought to the attention of the court.

In *People v. French* (92 N. Y. 306), the question to be reviewed here arose prior to September 1, 1880, the time when this part of the Code went into effect, and it was held that by its express provisions the review was to be had upon the law as it stood when the question arose. But this court was asked in that case to take jurisdiction and review the facts under that section. It was decided that no review could be had thereunder for the reasons above stated.

RUGER, Ch. J., continued his opinion after such statement and said: "But beyond this it is quite apparent that section 1240 has no application to appeals to this court from decisions made upon the hearing of common law *certioraris*. The provision quoted is by its terms confined to proceedings occurring at the hearing upon the return of the writ and must necessarily be confined to the court in which such hearing is had. The general scheme for the distribution of judicial powers established by the laws and practice of the State does not contemplate the review by this court of disputed questions of fact, and it will not entertain such questions in the absence of express provisions of law authorizing such review."

In *People v. Board of Police Commissioners* (93 N. Y. 97), MILLER, J., uses the language of this section without referring to it, but assuming the application of the rule held that no cause for interference was shown. That was a case where the board dismissed a member of the force, and the General Term affirmed the determination and this court refused to interfere.

A reference to some of the sections which precede and follow the one in question, strengthens the correctness of the

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view taken in the ninety-second of New York (*supra*); section 2138 provides that the hearing must be had at a General Term of the court, and either party may notice for such hearing after the return is complete; by section 2141, the court may make a final order annulling or confirming, wholly or partly, or modifying the determination reviewed, as to any or all the parties; and, by section 2144, the final order of the court must be entered in the office of the clerk where the writ was returnable; but, before it can be enforced, an enrollment thereof must be filed. For that purpose the clerk must attach together and file in his office the papers upon which the cause was heard; a certified copy of the final order, and a certified copy of each order which, in any way, involves the merits or necessarily affects the final order. All these sections clearly provide for the order which is made upon the original hearing before the court granting the writ, and do not, in anywise, provide for the hearing upon an appeal here.

We are quite clear, therefore, that our jurisdiction is not enlarged by the section of the Code under consideration. As there was enough in the evidence to call for the exercise of the discretion of the Supreme Court in reversing on the facts as against the weight of evidence, we cannot interfere with its determination on that question.

We do not mean to say that, under no circumstances, could we review such determination. In cases involving a plain violation of the well known rules governing applications for a new trial on the ground that the verdict is against the weight of evidence, or when it could be seen that there was an abuse of the discretion of the court, and, possibly, in some other cases, this court might review the decisions of the lower court, but here is no such case.

The appeal should, therefore, be dismissed, with costs.

All concur.

Appeal dismissed.

Statement of case.

THE PEOPLE ex rel. THE NEW YORK, ONTARIO AND WESTERN
RAILROAD COMPANY et al., Respondents, v. ALFRED C.
CHAPIN, Comptroller, etc., et al., Appellants.

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The provision of the act creating the Board of Railroad Commissioners (§ 13, Chap. 353, Laws of 1882), providing that the salaries and expenses of the board shall be borne by the railroad companies by assessing upon each "its just proportion, * * * one-half in proportion to the length of main track or tracks on road," means the length of the road, including its branches and auxiliary lines, if any, not the aggregate length of all its tracks where it has two or more parallel tracks between two terminal points.

As to whether a determination of the officers empowered by that act to make the assessment is reviewable on *certiorari*, *quære*.

(Argued June 7, 1887; decided June 21, 1887.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 3, 1886, modifying an assessment upon the relators made by the State comptroller and assessors under the act (Chap. 353, Laws of 1882) for the salaries and expenses of the Board of Railroad Commissioners.

One-half of the said salaries and expenses was apportioned by assessment upon each railroad in the State in proportion to the length of its road. The General Term decided that where a railroad had two or more tracks running parallel with each other all should be included in making the apportionment.

Denis O'Brien, attorney-general, for Alfred C. Chapin, comptroller, appellant. The intention of the legislature was that the apportionment and assessment of the expenses of the board of railroad commissioners was to be made not upon the cost of construction of the several railroads or the extent of their tracks, but the true test should be the value of the property, based upon its earnings and income. (*People ex rel. Buffalo & L. S. R. R. Co. v. Barker*, 48 N. Y. 70; *People ex rel. A. & G. Bridge Co. v. Weaver*, 20 W. D. 565; *People ex rel. R. R. Co. v. Keator*, 36

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Hun, 596.) The appellants herein acted in an administrative capacity in the exercise of powers in which the people at large are concerned, and a great public inconvenience would result from interfering with their proceedings. (*People v. Supers.*, 15 Wend. 206.) The assessment having been completed and put in process of collection, had gone out from the custody of the appellants, whose determination was to be reviewed, and the court should not review the assessment but should quash the writ. (*People v. Supers. of Greene*, 82 N. Y.; *People ex rel. Marsh v. Delaney*, 49 id. 655; *People v. Com'rs Taxes*, 43 Barb. 494; *People v. Walter*, 68 N. Y. 263; *People v. B'd Supers.*, 34 Hun, 266; *King v. King*, 2 T. R. 234; *People v. Supers. Alleg. Co.*, 15 Wend, 197, 210; *Lawton v. Com'rs of Cambridge*, 2 Caines, 182; *In re Mt. Morris Square*, 2 Hill, 28; *People v. Common Council Utica*, 65 Barb. 9, 22; *People v. Stilwell*, 19 N. Y. 531, 532; *Kilbourn v. St. John*, 59 id. 26; *People v. B'd Aldermen*, 10 Abb. N. C. 34; *Western R. R. Co. v. Nolan*, 48 N. Y. 518; *People v. Assessors of Alb. Co.*, 2 Hun, 583, 591; *Susque. B'k v. Supers. Broome*, 25 N. Y. 312, 315; *Sheridan v. Andrews*, 52 id. 450. The return to *certiorari* must be taken as conclusive and acted on as true. If false in fact, "the remedy is an action for a false return." (*People ex rel. McCarthy v. French*, 25 Hun, 111.) A party assailing an assessment as excessive must make it appear conclusively that the methods by which the assessors arrived at the result complained of were incorrect, and that the assessment does not represent the fair value of the property assessed. (*People v. Davenport*, 91 N. Y. 574.) The relators cannot question the validity of the act of 1882. (*Vose v. Cockcroft*, 44 N. Y. 415.)

Hamilton Harris, for New York Central and Hudson River Railroad Company, appellant. The act sought to be reviewed was not a judicial act and is not the subject of review by the court. (Laws of 1882, chap. 353, § 13; *People v. Walter*, 68 N. Y. 411.) But even if a judicial act, the court could not and would not review it by *certiorari*.

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(*People v. Fire Com'rs*, 77 N. Y. 605; *People v. Brooklyn*, 8 Hun, 56; *People ex rel. Mayor, etc. v. McCarthy*, 34 Alb. L. J. 236.) The State officers having made the apportionment and filed the same in the office of the comptroller in accordance with the requirements of law, their duties were fully performed and their action was consummated and put beyond recall. (*People v. Walter*, 68 N. Y. 403, 411; *People v. Delaney*, 49 id. 655; *People v. Sup'rs of Queens Co.*, 82 id. 276; *People v. Contracting B'd*, 33 id. 382. The return to the writ must be taken as conclusive and acted upon as true. (*People ex rel. v. Fire Com'rs*, 73 N. Y. 437.)

John B. Kerr for respondents. *Certiorari* was the relator's proper remedy. (Code, § 2140; *People v. Hall*, 80 N. Y. 125; *People v. Zoll*, 97 id. 208.) In the appellants were combined such duties as are performed by boards of assessors and supervisors in respect to the assesment of taxes; and the courts have uniformly reviewed the proceedings of those officers by *certiorari*. (*Barhyte v. Shepherd*, 35 N. Y. 238; *Western R. R. Co. v. Nolan*, 48 id. 513.) The roll is under the control and in the custody of the appellants, and the court had power to vacate, modify or change it as justice demands. (Code, §§ 2129, 2141, 2142; Laws of 1880, chap. 542, § 9.)

RAPALLO, J. We do not deem it necessary to discuss the point raised by the appellants that the determination complained of was not reviewable on *certiorari*, because we are satisfied that they correctly construed the statute, by virtue of which the apportionment of expenses sought to be reviewed was made. (Laws of 1882, chap. 353, § 13.) That section provides that the salaries and expenses of the board of railroad commissioners shall be borne by the several railroad companies, according to their means, to be apportioned by the comptroller and State assessors, who shall assess upon each of said corporations "its just proportion of such expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made and one-half in proportion to the length of the main track or tracks on road."

The relators contend that where, between two terminal points, there are laid two or more parallel tracks, all of them are main tracks, and that the assessment is to be made, not according to the *length* of those tracks, that is, the distance between the two terminal points, but according to the aggregate of the lengths of all the rails laid on all the tracks.

The appellants determined that the "*length* of the main track or tracks" meant the distance between two points, *i. e.*, the length of the road; and in this we think they were right. Where several tracks are laid between the same points, and parallel with each other, the *length* of all must be the same, and *length* is the quality, according to which the apportionment is required to be made, not the quantity or number of miles of railroad laid.

It is argued that the use of the terms "main track or tracks" indicates a different intent, and that if it had been intended that only a single track should be measured the term "main track" would have been used.

We do not think this argument by any means conclusive. Supposing that the statute had exclusive reference to railroads which were operated only between two points, but between those two points some of them had numerous parallel tracks, there would be more force in the argument, yet it would not be conclusive, for if all those tracks are to be considered as main tracks it would only be descriptive of the road to speak of the length of its main tracks, and would not indicate that all the lengths of those parallel tracks were intended to be aggregated. But when it is considered that, although the statute embraced some roads which had only one line, it also embraced other roads which were operated between several different terminal points, in different directions, and that each line had a main track, it is obvious that if all of these main tracks were to be included, accuracy of expression required that the terms "*length of main track or tracks*" should be employed, and their use indicates no intention that anything but the length of each road, including its several branches and auxiliary lines, if any, should be considered.

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The judgment of the Supreme Court should be reversed and the proceedings of the appellants affirmed, with costs against the relators in both courts.

All concur.

Ordered accordingly.

HARRISON R. JOHNSTON, Respondent, v. THOMAS F. DONVAN et al., SILAS J. DONVAN et al., Petitioners, etc., Appellants.

The real owner of mortgaged premises does not forfeit his right to be made a party to an action to foreclose the mortgage by an omission to record his deed; and, provided he make application in due time, it is the duty of the court to direct him to be brought in. (Code of Civil Pro. § 452.)

The members of a firm contracted for the purchase for the firm of certain real estate, the title was taken in the name of one of them for their joint benefit, the grantee giving back a mortgage for the purchase money. *Held*, that the other two partners were entitled to be made parties defendant; and that the questions as to whether a valid trust was created in their favor, or as to whether they were in a position to defend against the mortgage could not properly be determined on a motion to have them brought in as parties, but were questions to be litigated on trial of the action.

(Argued June 7, 1887; decided June 21, 1887.)

APPEAL by Silas J. and James V. Donvan from order of the General Term of the Supreme Court in the first judicial department, made January 22, 1887, which affirmed orders of Special Term denying the application of said appellants to be made parties defendant herein.

The nature of the action and the material facts are stated in the opinion.

George C. Holt for appellants. The appellants, Silas J. Donvan and James V. Donvan, have an absolute right to be joined as defendants in this action. (Code of Civ. Pro. § 452; *Chester v. Dickerson*, 54 N. Y. 1; *Fairchild v. Fairchild*, 64 id. 471; *Reed v. Marble*, 10 Paige, 410; *Hall v.*

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Nelson, 23 Barb. 88.) In a foreclosure suit all persons having an interest in the property at the time of filing the *lis pendens* have an absolute right to be made parties. (*Earle v. Hart*, 20 Hun, 75; *Haas v. Craighead*, 19 Hun, 396; *Chandler v. Powers*, 25 id. 445; *People v. Albany & Vt. R. R. Co.*, 77 N. Y. 232.) As to parties who have acquired their interest before the filing of the *lis pendens*, the right to be joined is absolute under the statute. (*Earle v. Hart*, 20 Hun, 75; *People v. Albany & Vt. R. R. Co.*, 77 N. Y. 232.)

Hamilton Wallis for respondent. The conveyance to James V. Donovan not having been recorded, he was not a necessary party to the suit. (Code, § 1671.) Not being necessary parties, it was entirely within the discretion of the Supreme Court to admit or refuse to admit the appellants as parties to the litigation, and such discretion cannot be reviewed here. (*Ith. Gas L. Co. v. Treman*, 93 N. Y. 660.) James V. Donovan by the conveyance to him having assumed and agreed to pay this mortgage, principal and interest, is thereby precluded from defending against it. (*Root v. Wright*, 21 Hun, 344.)

ANDREWS, J. The petition of Silas J. Donovan and James V. Donovan to be made parties defendant was denied on the merits. We think it should have been granted. Section 452 of the Code of Civil Procedure declares that "where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment." The action was for the foreclosure of a mortgage on real property executed by Thomas F. Donovan, one of the defendants in the action, to whom the premises were conveyed by the mortgagee, March 31, 1880. Prior to the commencement of the action, and on the 20th day of February, 1883, Thomas F. Donovan conveyed the mortgaged premises to the

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petitioner, James V. Donovan, by deed, subject to the mortgage, containing a covenant of assumption by the grantee. The deed to James V. Donovan had not been recorded at the time of the commencement of the action, but he then held and still holds the legal title to the mortgaged premises. The facts presented by the petition made a case as to the petitioner, James V. Donovan, which was directly within section 452 of the Code. He had an interest in the subject of the action, and his title to the land would or might be affected by the judgment which the plaintiff sought therein. The application was made before the time for answering had expired, and no laches in making the application are imputable to the petitioner. It is no answer to the application that the plaintiff was not in fault in bringing the action against the person having the record title, or that if the action had proceeded to judgment the petitioner would have been bound thereby. (Code, § 1671.) This is not the test of the right of the real party in interest to be made a party to the litigation upon his application under section 452. He is not compelled to commit his defense to the hands of a stranger to the title, and the real owner of real property does not forfeit his right to be made a party to the action, and to defend his title in that character, because he has omitted to record his deed, provided his application is made in due time. It appears from the petition that the original conveyance to Thomas F. Donovan was taken by him in trust for his brothers James V. Donovan and Silas J. Donovan, the petitioners, and that the subsequent conveyance by Thomas F. Donovan to James V. Donovan was taken by the latter in trust for himself and his brother Silas, and that the land was originally purchased by them as partners, and the title taken in the name of the defendant Thomas for their joint benefit. It is claimed that no valid trust was shown either in Thomas, the original grantee, or in James V., and also that the petitioners are not in a position to defend against the mortgage. These are questions which may be litigated on the trial. It is not proper on a motion of this kind to pass upon the merits of the controversy. We think

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the courts below erred in denying the motion, and the orders of the Special and General Terms should, therefore, be reversed and an order entered granting the application of the appellants, with costs.

All concur.

Ordered accordingly.

FRANK M. JENKINS, Respondent, v. JOHN L. PUTNAM,
Appellant.

It seems that the provisions of the Code of Civil Procedure (§§ 870, 873), in reference to the examination of a party to an action before trial, do not absolutely bind the judge to whom application is made for such an examination to grant an order, although the affidavit presented in form conforms to the requirements of said provisions

Where, from the nature of the action and the other facts disclosed, the judge can see that the examination is not necessary; that it is sought merely for annoyance or delay, he may in his discretion, deny the application. Conceding the provision requiring the judge to make the order to be mandatory, it does not interfere with the power of the Supreme Court; it may, on motion, in the exercise of its discretion upon all the facts appearing, vacate the order and leave the party to take the examination on the trial.

An order vacating an order for the examination of a party is not reviewable here, unless it appears from it that the decision was placed upon some ground of law not involving discretion.

(Argued June 7, 1887; decided June 28, 1887.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 7, 1887, which affirmed an order of Special Term, vacating a justice's order for the examination of the plaintiff as a witness before trial.

The facts are sufficiently stated in the opinion.

Charles S. Lester for appellant. Under the Code, a party has a right to examine his adversary at any time before trial. (Code, § 870; *Davis v. Stanford*, 37 Hun, 531; *Harrold v.*

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N. Y. El. R. R. Co., 21 id. 268; *Sweeney v. Sturgess*, 24 id. 162; *Ball v. Evening Post*, 5 N. Y. 229; *Tebo v. Baker*, 77 id. 33.) The right of a party to examine his adversary upon all of the material issues of the case is an absolute and unqualified right, and when a party complies with section 872 of the Code of Civil Procedure he is entitled to the order for examination. (*Glenny v. Stedwell*, 64 N. Y. 120; *Green v. Wood*, 15 How. 338; *Harrold v. N. Y. El. R. R. Co.*, 21 Hun, 271; *Davis v. Stanford*, 37 id. 531; *Sweeney v. Sturgis*, 24 id. 162) A bill of discovery might be filed as well to rebut and repel a claim as to establish an original case. (*Atlantic Ins. Co. v. Jose Maria Lunar*, 1 San. Ch. 91; *Schroeffel v. Redfield*, 5 Paige, 245; *Norton v. Woods*, id. 249; *Vance v. Andrews*, 2 Barb. Ch. 370; *Sperry v. Miller*, id. 632; *Lane v. Stebbins*, 3 Edw. Ch. 480; *Glascott v. Copper Miners' Co.*, 11 Sim. 305.)

John L. Henning for respondent. Where an order to examine is granted within the provision of section 870 of the Code, and the question is whether the affidavit is sufficient within section 872 of the Code, and the rules of the Supreme Court, then the granting or the refusing of the order is discretionary. (*Glenney v. Stedwell*, 64 N. Y. 120; *King v. Leighton*, 58 id. 384; *Merch. Nat. Bk. v. Sheehan*, 101 id. 176.) The order being discretionary with the court below, its determination is not reviewable in this court. (*Greenleaf v. Brooklyn, etc., R. R. Co.*, 102 N. Y. 96; *Woerishoffer v. N. River Const'n Co.*, 99 id. 398.) The court is not bound to grant an order to examine a party even if the papers are formally correct. It may examine into the facts and object, to see that the law is not perverted to mischievous and injurious ends. (*Chapin v. Thompson*, 16 Hun, 53; *Schepmoes v. Bousseen*, 1 Abb. [N. C.] 481.) Upon an application under section 872 of the Code to examine the adverse party as a witness before trial the affidavit must state such facts and circumstances as will authorize the court or judge to conclude that the testimony of such witness is in fact necessary and

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material. (Sup. Ct. Rule, 83; *Chapin v. Thompson*, 16 Hun, 53-56; *Crook v. Corbin*, 23 id. 176; *Fourth Nat. Bk. v. Boynton*, 29 id. 441; *Robertson v. Russell*, 20 id. 243; *Beach v. Mayor, etc.*, 14 id. 79; 1 Abb. [N. C.] 337, note.) A party cannot be compelled to be examined before trial when the evident object of the examination is to compel him to disclose the evidence by which he intends to establish his case, or where the object is simply to disprove that party's case. (*Adams v. Cavanaugh*, 37 Hun, 232, 236, 237; *Chapin v. Thompson*, 16 id. 53; *McMahon v. Brooklyn City R. R. Co.*, 20 Week. Dig. 404; *Wallace v. Wallace*, 19 id. 495.)

EARL, J. The defendant, desiring to obtain an examination of the plaintiff before trial, made an affidavit, in which, among other things, he stated "that the action is brought to recover for services and expenditures alleged by plaintiff to have been made and rendered by him in procuring a purchaser for certain real estate owned by defendant, and in making a sale of said real estate for the sum of \$12,000, which, plaintiff alleges, he did upon the employment of the defendant, and which services, plaintiff also alleges, were worth \$300, and the judgment demanded is for \$300, besides costs; that an answer to said complaint has been served in which each and every allegation of the said complaint is denied;" that "the testimony of said plaintiff is material and necessary for the defendant and for the defense of said action; that said plaintiff has knowledge of all the facts and circumstances relating to his alleged employment by defendant, and his alleged sale of real estate; and defendant expects to prove by said plaintiff that he was not employed by the defendant as alleged in said complaint, and that he did not, in fact, sell said real estate." The affidavit was presented to a justice of the Supreme Court who made an order requiring the plaintiff to appear before a referee, named for the purpose, of being examined and to have his deposition taken in the action. Upon a motion subsequently made by the plaintiff at a Special Term of the Supreme Court, the same judge who granted the order, there presiding,

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vacated and set it aside. The General Term having affirmed the order of the Special Term, an appeal has been taken to this court.

We are of opinion that the order appealed from is not reviewable here. Section 870 of the Code of Civil Procedure provides that the examination of a party to an action may be taken at the instance of an adverse party at any time before trial; and section 872 specifies what the affidavit, to obtain an order for such an examination, must contain. It requires that it must set forth, among other things, the nature of the action, and that the testimony of the party to be examined is material and necessary for the party making the application. Section 873 provides that the judge to whom such an affidavit is presented, "must" grant an order for the examination if an action is pending, and that the order may, in the discretion of the judge, designate and limit the particular matters as to which the party shall be examined.

While it is said in section 873 that the judge "must" grant the order, when an affidavit conforming to the requirements of the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion. The affidavit is required to disclose the nature of the action, and to set forth that the testimony of the party is material and necessary, and the judge must be able to see from the facts stated that the testimony is material and necessary. If from the nature of the action and the other facts disclosed he can see that the examination is not necessary for the party seeking it, then it cannot be supposed that it was the legislative intent that he should be obliged, nevertheless, to make the order. Here there is no allegation in the affidavit showing that the facts were not perfectly known to the defendant, or that it was important for him to have the testimony of the plaintiff before the trial, or that he had any reason to apprehend that he could not have his examination at the trial. The nature of the controversy shows that the facts of the case were probably within the knowledge of the defendant,

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as the contract is alleged to have been made with him, and the services were claimed to have been rendered in the sale of his property. It is scarcely possible that the facts were not all as well known to the defendant as to the plaintiff, and as the defendant could examine the plaintiff at the trial, it does not appear that it was essential that he should have his examination before trial. The very purpose of requiring that the affidavit should set forth the nature of the action and of the defense thereto is to enable the judge to determine whether the examination should be ordered, and to place limits upon it. While the whole examination is placed within the absolute control of the judge by the power given him to place limits upon it, it cannot be supposed that it was intended to absolutely bind him to grant it, whatever might be his judgment as to its propriety or necessity. Where the judge can see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he ought not to be required, and cannot absolutely be required, to make the order.

Even upon the assumption that the provisions of the Code, which allow the examination of a party before trial and upon the trial, are substitutes for the bill of discovery in chancery, yet, upon the facts alleged in this affidavit, a bill of discovery could not have been maintained by the defendant against the plaintiff. It would have been dismissed as a "fishing bill" on the ground that the discovery was not necessary to enable the defendant to make his defense.

But, even if the provision requiring the judge to make the order should be held to be mandatory, yet the power of the Supreme Court to deal with the matter is left intact. It may, in the exercise of its discretion, upon all the facts appearing, vacate the order and leave the party to take the examination at the trial. It is one of those matters of practice and procedure which should always be left to the discretion of the court of original jurisdiction, and its decision should not be reviewed here unless it appears from its order that the decision was placed upon some ground of law not involving discretion.

Statement of case.

This conclusion is sanctioned by the cases of *Glenney v. Stedwell* (64 N. Y. 120) and *Bank v. Sheehan* (101 id. 176),

The appeal should be dismissed, with costs.

All concur, except RAPALLO, J., who votes for affirmance.

Appeal dismissed.

CALEB E. WHITAKER, Appellant, v. JOHN M. MASTERTON et al.,
Respondents.

106 277
137 344

The penalty imposed by the General Manufacturing act (§ 12, Chap. 40, Laws of 1848), upon trustees of a corporation organized under it, for failure to make and file the prescribed annual report, is not applicable to, and is not incurred by, a non-compliance with the provision of the act of 1853 (§ 2, Chap. 333, Laws of 1853), which requires that in all statements and reports which are to be published of a company, any portion of the stock of which has been issued in payment for property "it shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

An annual report filed by a manufacturing corporation stated the amount of its capital and that all of it had "been paid in in cash, patent rights, merchandise, machinery accounts, etc., necessary to the business and for which stock to the amount of the value thereof has been issued by the company." In an action by a creditor of the corporation against the trustees for alleged failure to make the prescribed report, *held*, that the report made was a sufficient compliance with the requirements of the act; that it was not necessary to specify therein how much of the capital was paid in cash and what amount in property; and that, therefore, the action was not maintainable.

The provision of the act imposing the penalty is to be construed like other penal statutes; its scope may not be enlarged by construction or implication and the penalty may not be imposed except in cases where the plain language of the provision requires it.

(Argued June 9, 1887; decided June 28, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 4, 1885, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury.

Statement of case.

The Imperial Skirt Manufacturing Company was a corporation organized under the general manufacturing act of 1848, and the acts amendatory thereof. At various periods, during the year 1877, it made its four promissory notes, amounting in the aggregate to the sum of \$13,000, and delivered them to the plaintiff for value. At their maturity the several notes were dishonored, and the plaintiff then commenced an action upon them against the corporation and recovered judgment therein. A portion of the judgment was collected and the balance of \$11,610.47 was left unpaid; the present action was commenced against these defendants, as trustees of the corporation, to recover that sum with interest. In his complaint the plaintiff alleges three causes of action: (1.) That the defendants were trustees of the corporation, and that it did not, within twenty days from the 1st day of January, 1878, make, file and publish the annual report required by the statute, but that the defendants did, as matter of fact, on or about the 18th day of January, 1878, file and publish what purported to be a report, which, though it did state that the capital of the company had been paid in in cash, patent rights, merchandise, machinery, etc., did not state the proportion in which it had been so paid in, nor how much stock was issued for money and how much for property, and that they thus wholly failed to comply with the provisions of the statute. (2.) That the defendants, being such trustees and officers, did, on or about the last mentioned day, publish what purported to be a report, but that the same was false in a material representation; and (3.) That the defendants, in organizing the corporation, conspired to deceive and defraud the plaintiff.

The further material facts appear in the opinion.

Geo. V. N. Baldwin for appellant. The defendants were liable because the report failed to state "the proportion of capital actually paid in." (Laws of 1853, chap. 833; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 66; *Glens Falls Paper Co. v. White*, 18 Hun, 214; *Knight v. Dederick*, 6 N. Y. Week. Dig. 150.)

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Flamen B. Candler for respondents. The report complained of was sufficient. (Laws of 1848, chap. 40, § 12; *Glens Falls Paper Co. v. White*, 18 Hun, 214; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Bonnell v. Griswold*, 80 id. 128; *Pier v. Hanmore*, 86 id. 95.) The Law of 1848, chapter 40, so far as sections 12 and 15 are concerned, is a penal statute, and the court cannot extend it by inference, but should, on the contrary, give to the statute a strict construction. (*Bonnell v. Griswold*, 80 N. Y. 138; *Merch. B'k of N. H. v. Bliss*, 35 id. 412; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Wiles v. Suydam*, 64 id. 173; *Easterly v. Barber*, 65 id. 252.) The plaintiff failed to establish any cause of action against the defendants under section 15, chapter 40, Laws of 1848, as he did not show that they made a false report, knowing it to be false. (*L. Sup. I. Co. v. Drexel*, 90 N. Y. 87; *Pier v. Hanmore*, 86 id. 95; *Butler v. Smalley*, 101 id. 71, 74.)

J. K. Hayward, for Alexander Masterton, respondent. A disregard of the provision of the act of 1853 (chap. 333, § 2), requiring the fact of the issue of stock for property to be stated in the annual report, did not subject defendant to the penalty of section 12 of the act of 1848 (chap. 40). (*Bonnell v. Griswold*, 80 N. Y. 128; 89 id. 122; *Pier v. Hanmore*, 86 id. 95.)

EARL, J. The trial judge found that there was no fraud or conspiracy, as alleged by the plaintiff in the second and third causes of action, and the findings against the plaintiff in reference to those causes of action being based upon sufficient evidence, and having been affirmed by the General Term, conclude us, and we have no power to review or interfere with them. Our sole duty, therefore, is to determine whether the court below erred in reference to the first cause of action.

It is undisputed that the defendants, as trustees of the corporation, made, filed and published a report on the 18th of January, 1878, which is as follows: "Amount of the capital of the company, \$50,000; amount of the capital paid in, \$50,000, all of which has been paid in in cash, patent

rights, merchandise, machinery, accounts, etc., necessary to the business, and for which stock, to the amount of the value thereof, has been issued by the company; amount of the existing debts of the company do not exceed \$38,500. John M. Masterton, president; R. S. Masterton, E. D. Smith, A. Masterton, majority of the trustees."

The contention of the plaintiff is that this report was wholly inadequate and inoperative, because it did not state the proportion of the capital paid in and what amount thereof was paid in cash and what amount in property; and, therefore, it is claimed that the report did not comply with section 12 of chapter 40 of the Laws of 1848, which, as originally enacted, provided that every corporation organized under that act should annually, within twenty days from the first day of January, make, verify, publish and file a report, stating "the amount of capital and of the proportion actually paid in, and the amount of its existing debts," and that if any corporation should fail so to do, all its trustees should be jointly and severally liable for all its debts then existing and for all that should be contracted before such report should be made.

As we have repeatedly held, this section is highly penal and it should be construed like other penal statutes. Its scope should not be enlarged by construction or implication, and the courts should not impose the penalty except in cases where the plain language of the section requires it. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Wiles v. Suydam*, 64 N. Y. 173; *Bonnell v. Griswold*, 80 N. Y. 128, 135; *Brackett v. Griswold*, 103 N. Y. 425.) The report made by the defendants was, in form, a full compliance with the section referred to. It stated the amount of the capital; that it was all actually paid in, and the amount of the existing debts of the company. That was all that was required to be stated, and the penalty was imposed for an omission to make, publish and file a report containing such matters. The penalty could not be incurred, as we have held, if the report in form complied with the section, unless it was false, in which event liability was imposed by section 15.

The act, chapter 333 of the Laws of 1853, purports to be an act amending the general manufacturing act of 1848, and section 2 of that act provides as follows: "The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any other further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid in to the company, but shall be reported in this respect according to the fact." This section imposes no penalty for non-compliance with its requirements, and section 12 of the manufacturing act cannot be so incorporated into this section, or this section so incorporated into that, as to make the penalty prescribed by that section applicable to this.

There was no violation of this section in the report which these defendants made. They stated that all of the capital was paid in, some of it in cash and the balance in the property mentioned; and thus the report was according to the fact. This section does not require the report to specify how much of the stock was paid for in cash and how much in property. It would be too rigorous to hold that for a failure to make such specifications, trustees are to be held liable for all the debts of the corporation. This is made clearer by a reference to the act chapter 510, of the Laws of 1875, which is an act simply amending section 12 of the act of 1848, by re-enacting the same with amendments; and the section so far as is material to this case was not changed. It still requires a report to state only "the amount of capital and the proportion actually paid in, and the amount of existing debts," and for a failure to make such report, the trustees are made liable for all the debts of the corporation. If it had been the intention of the law makers to impose the penalty for non-compliance with the act of 1853,

it is to be supposed that such intention would have been embodied in some form in this section as amended. But with the statute of 1853, before them they specified in the section as amended precisely what the report should contain, and for what the penalty should be incurred.

There is no good reason for extending the penal provisions of section 12 as amended to cases not plainly within the language used. The capital is required to be paid in cash or property, and stock can be issued only for cash and the actual value of the property. It, therefore, cannot be very important in any case to creditors to be informed by the report of a corporation how much of its capital was paid in cash and how much in property. The capital of a manufacturing corporation is not kept in cash, but is invested in property, and it cannot usually be very important to creditors to know whether a corporation upon its organization received property, or whether it received cash which was subsequently invested in property. If property necessary to the business of a corporation is taken at its value it is frequently better than cash. Such a report as this is sufficient to put creditors upon inquiry. They can see by it that some portion of the capital was paid in cash and some in property, and they can by inquiry ascertain what the truth is. We cannot, therefore, say that the legislature intended to inflict upon trustees of a manufacturing corporation a penalty for not specifying in their report how much of the capital stock of the corporation was issued for cash, and how much for property. And while this point has not been precisely decided in this court, our present views in reference to it receive much countenance from the following decisions: *Bonnell v. Griswold* (80 N. Y. 128; 89 id. 122); *Pier v. Hanmore* (86 N. Y. 95).

We are, therefore, of opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

DANIEL VAIL, Respondent, v. THE LONG ISLAND RAILROAD
COMPANY et al., Appellants.

106	283
126	586
106	288
135	352
106	288
144	551

Where, in an action to restrain the alleged unlawful use and occupancy of plaintiff's premises, he bases his right to recover in his complaint and upon the trial exclusively upon his legal title to the land and the invasion of his right as owner, he may not sustain a judgment in his favor on appeal on the ground that the *locus in quo* is a public highway in which he has rights as abutting owner which have been infringed upon by defendant.

The acquisition by a town of a fee in land for highway purposes by voluntary grant is within the powers conferred upon it by statute. (1 R. S. 337, § 1, subd. 2.)

Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor; the possibility of reverter merely is not an estate in land.

A deed conveyed, for a valuable consideration expressed, a certain strip of land described therein to a town and its "assignees forever," with covenants of warranty. Following the description was the following: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." *Held*, that the deed conveyed the fee of the land, not an easement merely; that the clause restricting the use operated at most as a condition subsequent, and until the contingency happened the whole title was in the grantee.

(Argued June 13, 1887; decided June 28, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

E. B. Hinsdale for appellants. The land in question not being granted upon condition, and no provision for reverter in case of a different use being inserted in the deed, the clause that it is to be used as a highway, with all the privileges

Statement of case.

thereunto belonging, for such purposes only, is nothing but a naked prohibition, inconsistent with the grant, and void. (*Craig v. Wells*, 11 N. Y. 315, 322; *Kenney v. Wallace*, 24 Hun, 478.) At the most, the attempted limitation of the use could not operate to prevent the vesting of the fee immediately. It is a mere condition subsequent, raising a possibility of reverter, in case the town should put the land to other uses. (*Buff. Pipe Line Co. v. N. Y., L. E. & W. R. R. Co.*, 10 Abb. [N. C.] 107; *Underhill v. S. & W. R. R. Co.*, 20 Barb. 455; *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Erwin v. Hurd*, 13 Abb. [N. C.] 91; *Duryee v. Mayor, etc.*, 96 N. Y. 477, 497.) Towns may own lands in fee. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Kenney v. Wallace*, 24 Hun, 478.) The admission of plaintiff's father, being of ownership in defendant and not of mere possession or license, was sufficient proof of its title. (*Abeel v. Van Gelder*, 36 N. Y. 513; *Chadwick v. Fomner*, 69 id. 404; *Enders v. Sternbergh*, 2 Abb. Ct. App. Cas. 31; *Knapp v. Hungerford*, 7 Hun, 588; *Lucky v. Odell*, 46 Super. Ct. R. 547.) The judgment cannot be sustained upon the theory of damage to plaintiff as an abutting owner. (*Clark v. Dillon*, 97 N. Y. 370; *Mahady v. B. R. R. Co.*, 91 id. 148; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98, 107; *Armstrong v. Dubois*, 90 id. 95.) Plaintiff, having no title to the strip of land upon which the side track was built, could not maintain an action for injunction without showing that his damage was essentially different in kind from that suffered by other abutting owners. (*Osborne v. Brooklyn City R. R. Co.*, 5 Blatchf. 366; *Currier v. W. Side El. R. R. Co.*, 6 id. 487.)

Timothy M. Griffing for respondent. The plaintiff's homestead being on the south side of and adjoining the highway, his title to the soil goes to the center of the highway. (*Wager v. Troy U. R. R. Co.*, 25 N. Y. 529.) The use of a highway for a railroad is a new burden, beyond the public easement. Such use, without acquiring the title of the owner of the fee or his license, is a continuing trespass, and he may maintain

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ejectment to recover the land subject to the public easement as a highway. (*Wager v. Troy U. R. R. Co.*, 25 N. Y. 526.) The defendant had gained no title by adverse possession. (*Watson v. N. Y. C. R. R. Co.*, 6 Abb. [N. S.], 91.) Title was not the only issue. Even if the plaintiffs did not own to the center of the highway, it was proper that the court should restrain defendants from an unlawful use of the highway. (*Mahady v. B. R. R. Co.*, 91 N. Y. 148; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98, 106, 123.)

ANDREWS, J. The complaint alleged an unlawful entry by the defendant on the lands of the plaintiff for the purpose of constructing a side track of the defendant's road thereon, to be used in connection with its depot at Riverhead, and for depositing cars, engines and freight, and loading and unloading cars. With a view to equitable relief by injunction it was averred that the acts of the defendant would occasion great injury, annoyance and nuisance to the plaintiff, his family, business and dwelling-house, the latter being only one hundred and eleven feet from the main track of the defendant's road. The defendant in its answer, among other things, put in issue the plaintiff's title to the land over which the side track was being constructed. The judge before whom the action was tried found that the plaintiff was owner in fee of an undivided sixth part of the land occupied by the side track, and that the defendant had no title thereto and ordered judgment in favor of the plaintiff restraining the defendant from occupying or using the premises. The plaintiff in his complaint and upon the trial rested his right to recover exclusively upon his legal title to the land, and the invasion of his right as owner by the act of the defendant. This was the issue tried, and it was found by the court for the plaintiff, and the judgment was based upon and pursued the complaint and finding. The correctness of the judgment must depend, therefore, upon the correctness of the finding upon the question of title. The General Term, however, without passing upon the question of title,

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affirmed the judgment on the ground that, independently of the question of the ownership of the soil, the plaintiff had rights as abutting owner in the highway, over which the track was laid, which were affected by the act of the defendant and entitled the plaintiff, on account of the special injury suffered by him, to maintain the action. (*Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148.) But this ground was not suggested in the pleadings, nor, so far as appears, on the trial. The complaint made no reference to a highway, and the fact that the defendant's side track was in the highway appeared for the first time on the trial. It would be very unjust to affirm the case upon a ground so foreign to the issue presented by the pleadings. The plaintiff must, therefore, stand or fall upon the question of legal title. It is conceded that the land embraced in the highway was originally owned by one Charles Vail, the father of the plaintiff, who died leaving a will, which was duly proved, by which he devised to his six children, as residuary devisees, his lands not specifically devised. The specific devises in the will did not embrace the part of the highway over which the side track of the defendant is laid. To meet the *prima facie* evidence of title to the *locus in quo* in the six children of the testator, the defendant put in evidence a deed, executed in 1848 by the testator and others to the town of Riverhead, conveying to the town a strip of land fifty feet wide and 326 feet in length, for the consideration of \$67.90, "to be used as a highway, with all the privileges thereto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." The deed contains the usual covenants of warranty. It is claimed by the plaintiff that the words in the deed, "the above granted premises to be used as a highway, with the privileges thereunto belonging, for such purpose only," restrict the operation of the deed so as to make it a grant of easement only in the land, leaving the fee in the grantor. We are of opinion that the deed conveyed the fee of the land, and not an easement merely, and that the clause restricting

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the use of the land conveyed for highway purposes operated at most as a condition subsequent. When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor. The deed expressly conveys all the estate, title and interest of the grantors in the premises conveyed. The consideration is not nominal. The covenants of seisen or warranty run to the grantee, "his (its) heirs and assigns forever." There are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. (1 R. S. 748, § 1.) The possibility of reverter merely, is not an estate in land, and until the contingency happens the whole title is in the grantee. (*Craig v. Wells*, 11 N. Y. 315; *Nicoll v. N. Y. & E. R. R. Co.*, 12 id. 121; 4 Kent Com. 370; *Kenney v. Wallace*, 24 Hun, 478.) Towns are authorized to purchase and hold lands for the use of the inhabitants. (1 R. S. 820.) The acquisition by a town, by voluntary grant, of a fee in land for highway purposes is not *ultra vires*. The city of New York, under the act of 1813, is authorized to acquire the fee of lands for streets, but subject to a trust for street purposes, and under the general statute towns are not prohibited from taking a conveyance of a fee for highway purposes, and the power given includes such a conveyance.

We are of opinion that the plaintiff failed to establish title to the land over which the track of the defendant was laid, and the judgment should, therefore, be reversed and a new trial ordered.

All concur.

Judgment reversed.

Statement of case.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
JOSEPH ELLIOTT, Respondent.

To meet the requirements of the provision of the Code of Criminal Procedure (§ 399), forbidding a conviction upon the testimony of an accomplice unless "corroborated by such other evidence as tends to connect the defendant with the commission of the crime," it is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime or to connect the defendant with it; nor need such evidence be wholly inconsistent with the defendant's innocence: it is sufficient if there is some evidence fairly tending to connect the defendant with the commission of the crime; and it is then for the jury to determine whether the corroboration is sufficient to satisfy the jury of the defendant's guilt.

Defendant was indicted for forgery, charged as a second offense, in uttering a forged draft. An accomplice who procured the money on the draft from a bank in the city of R., testified on the trial to the commission of the crime. It appeared by other evidence that defendant had been previously convicted of the crime of forgery, sentenced and served a term in State's prison; that he and the accomplice were acquaintances and associates in the city of New York; that he was in R. and at C. a place near R., some days prior to the commission of the crime and registered at three hotels under an assumed name; that the accomplice was with defendant at C. and was introduced by him to a third person. The president of the bank testified that he thought he had seen defendant in the bank. Defendant gave no explanation of his presence at R. and after his arrest declared that he did not know and had never seen the accomplice. Upon being arrested in New York he asked the detective if any one had been arrested in R., and upon being asked "why" he said "there must be somebody who had done some talking," and while denying that he committed the crime, said he knew who did it. *Held*, that there was sufficient corroboration to sustain a conviction.

(Argued June 9, 1887; decided June 28, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 19, 1887, which reversed a judgment of the Court of Sessions in and for the county of Monroe, entered upon a verdict convicting defendant of the crime of forgery in the second degree.

The facts material to the question discussed are stated in the opinion.

Statement of case.

George A. Benton for appellant. Prior to the passage of section 399 of the Criminal Code a defendant could be convicted upon the uncorroborated evidence of an accomplice, if the jury believed it. (*People v. Everhardt*, 7 Cent. R. 53, 54; *Lindsey v. People*, 63 N. Y. 143, 144; *People v. Hoogherk*, 96 id. 149, 162.) The statute only requires corroboration by such other evidence as tends to connect the defendant with the commission of the crime. (*People v. Hoogherk*, 96 N. Y. 149, 162; *People v. Everhardt*, 7 Cent. R. 54; Greenleaf on Evid.; [Redf. Ed.] 57.) Evidence of a conviction for a prior offense is not proof of the commission of the crime subsequently charged, but it is proof of guilty knowledge. (*People v. Everhardt*, *supra*; *People v. Schulman*, in note to *Mayer v. People*, 80 N. Y. 373.) The acts and declaration of a party are evidence against him, and whether they tend to fix a crime upon him is for the jury. (*Lindsay v. People*, 63 N. Y. 154; 65 Barb. 48; *Foster v. People*, 50 N. Y. 598, 601; *People v. Druse*, N. Y. Crim. R. 10, 16; *People v. Ryland*, 1 id. 123, 130.)

P. Chamberlain, Jr. for respondent. As the crime charged was the forging of the draft and not a larceny of the money, the corroborative testimony should have associated the defendant with the draft. (*People v. Davis*, 21 Wend. 309; *People v. Haynes*, 55 Barb. 450; *Frazer v. People*, 54 id. 306; *People v. Hookerk*, 96 N. Y. 149; Roscoe's Crim. Ev. 122; Russell on Crimes, 962; *People v. Plath*, 100 N. Y. 596, 597.) The corroborative evidence must be of some material fact. (Roscoe's Treat. [6th Am. ed.] 122; 1 Greenl. on Ev. § 331; *People v. Courtney*, 28 Hun, 192; *Lindsay v. People*, 63 N. Y. 143; *Rex v. Wilkes & Edwards*, 7 Car. & Payne, 272; *Coleman v. State*, 44 Tex. 109; *People v. Ryland*, 97 N. Y. 125.) There is a wide difference between evidence which tends to satisfy an intelligent jury that the accused has perpetrated a crime, and such evidence as merely tends to raise in the minds of the jury, "a suspicion of guilt." (*People v. Williams*, 29 Hun, 520.)

Opinion of the Court, per EARL, J.

EARL, J. The defendant was indicted for the crime of forgery in the second degree, charged as a second offense, in uttering a forged draft for \$3,900, purporting to be drawn by a Montreal bank upon the National Bank of the Republic of New York. He was convicted and sentenced to imprisonment in the State prison at Auburn for the term of fifteen years. The principal evidence against him at the trial was that of an accomplice, and it is claimed, on his behalf, that the testimony of the accomplice was not sufficiently corroborated under section 399 of the Code of Criminal Procedure, which provides as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." The General Term held that the testimony of the accomplice was not sufficiently corroborated and upon that ground reversed the conviction and granted a new trial.

The accomplice testified, among other things, that he met the defendant in New York in July, 1885, that an arrangement was there made between them in pursuance of which they went to Rochester, and there the defendant planned the crime and handed him the forged draft to obtain the money from the Flour City Bank; that he took the draft to that bank and obtained credit for it on the fourteenth day of August, and on the next day he drew a check upon the bank by direction of the defendant and obtained \$2,500, of which sum he paid the defendant \$2,000. It appeared upon the trial, by evidence other than the testimony of the accomplice, that the defendant had been tried and convicted of the crime of forgery in the city of New York, on the 13th day of November, 1878, and was sentenced for a term of four years to the State prison at Sing Sing and that he served out his term; that he and the accomplice were acquaintances and associates in the city of New York before going to Rochester; that the defendant was in Rochester and Charlotte, near Rochester, for some days prior to the commission of the offense, and that he registered under an assumed name as

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J. W. Clay, of Patterson, New Jersey, at two different hotels at Rochester and at a hotel in Charlotte; that they were together at Charlotte where the defendant introduced the accomplice to another person, and that he admitted he was in Rochester, and he was seen there during the week when the forgery was committed. He had no apparent business in Rochester and gave no explanation of his presence there. The president of the Flour City National Bank testified that he thought he had seen him in the bank. He did not specify the time when that occurred, but as the inquiry related to no other time, and there was no evidence that the defendant was in Rochester at any other time, the fair inference is that it was about the time of the commission of the offense. After his arrest the defendant falsely declared that he had never seen the accomplice and that he did not know him. He was arrested for the offense by a detective in the city of New York, and before he was informed for what he was arrested, he asked the detective if anyone else had been arrested on the same charge. He told the detective that inspector Byrnes said he "would get twenty years." One Wilkes who was also arrested at the same time and was present, said that if he, Elliott, got twenty years, "they could do nothing with him," and Elliott said to Wilkes "if I go you will go," and Wilkes said "no, there wasn't no man living could tell anything about him;" defendant said he was satisfied there was some "squealing," that there was a "give away." He asked the detective if he had anyone in Rochester under arrest? The detective asked "why?" He said he wanted to know; "that there must be somebody who had done some talking." The detective then asked him why he did not get the money at the German American Bank instead of at the Flour City Bank, and he answered: "Is that what you want me for?" The detective said "yes," and the defendant said, "if that is what you want me for I can show that I am not the party, if you want me for getting the money there;" and he stated further to the detective that he "would stand up in any place with whiskers on or off and see

Opinion of the Court, per EARL, J.

if they could identify him as the man." Again he said "no, you are mistaken. I did not do it, but I know who did." All these circumstances certainly have some tendency to corroborate the evidence of the accomplice, and they seem to us to satisfy the requirements of the section of the Criminal Code referred to. Each circumstance taken by itself is quite inconclusive, but when considered together they certainly furnish some corroborative evidence. It is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime, or to connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The court before it should submit the case to the jury should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt. As we said in *People v. Everhardt* (104 N. Y. 591), "the law is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime, so that the conviction will not rest entirely upon the evidence of the accomplice." (See, also, *People v. Jaehne*, 103 N. Y. 182.) Here, within the rule thus laid down, there was such other evidence, and we are, therefore, of opinion that the judgment ought not to have been reversed.

The judgment of the Supreme Court, should, therefore, be reversed, and that of the Court of Sessions of Monroe county affirmed, and the proceedings remanded to that court with directions to enforce its judgment of conviction by committing the defendant to the Auburn State Prison to serve the unexpired term of his original sentence.

All concur.

Judgment accordingly.

Statement of case.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
HANFORD WEST, Appellant.

106	293
109	406
110	422

An indictment for a statutory misdemeanor, which charges the facts constituting the crime in the words of the statute and contains averments as to time, place, person and other circumstances to identify the particular transaction is good.

106	293
111	574
111	575

It is not a good objection to a statute prohibiting a particular act and making its commission a public offense; that the act was, before the enactment, lawful or even innocent.

106	293
114	63

The provision of the act of 1885 (§ 8, Chap. 188, Laws of 1885), "to prevent deception in the sale of dairy products," etc., which prohibits the selling or bringing of any milk, diluted with water or adulterated, to a butter or cheese manufactory to be manufactured, and declares a violation of the prohibition to be a misdemeanor is a valid exercise of legislative power.

106	293
119	233
106	293
138	415

The provision does not make a fraudulent intent a necessary ingredient of the crime.

It seems the said provision does not extend so far as to make it criminal for a dairyman conducting a butter or cheese manufactory and manufacturing from milk exclusively furnished by himself, to supply the factory with milk from his own cows mixed with water.

It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted.

An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed in the title.

(Argued June 14, 1887; decided June 28, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, made April 19, 1887, which reversed a judgment of the Court of Sessions in and for the county of Erie, entered upon an order sustaining a demurrer to the indictment herein. (Reported below 44 Hun, 162.)

The substance of the indictment is stated in the opinion.

A. J. Knight for appellant. An act of the legislature which interferes with a man's ordinary and legitimate business, or with his social and domestic privileges, affects his liberty, as well as an act that imprisons his person. (*In re Jacobs*, 98 N. Y. 98.) The act in question here cannot be sustained as

Opinion of the Court, per ANDREWS, J.

an exercise of any of the police powers vested in the legislature. (*In re Jacobs*, 98 N. Y. 108, 111; *Tiedman's Limitations of Police Powers*, 297.) The ordinary rule that an indictment for a misdemeanor is sufficient if it is set forth in the words of the statute, does not hold true when the words of the statute do not in themselves make a crime, and when other matters outside of those stated in the statute must be shown to constitute the crime. (*People v. Wilder*, 4 Park. Crim. R. 21; *U. S. v. Cruikshank*, 92 U. S. 542; *Comm. v. Filburn*, 119 Mass. 297; *Comm. v. Bean*, 14 Gray, 42; *Comm. v. Clifford*, 8 Cush. 215.)

George T. Quinby for respondent. The statute in question is a valid exercise of legislative power. (*People v. Shaeffer*, 41 Hun, 24; *People v. Cipperly*, 101 N. Y. 364.) The legislature may pass appropriate laws to protect the people against fraud and imposition. (*People v. Arensberg*, 103 N. Y. 388; *People v. Marx*, 99 id. 377; *Phelps v. Racey*, 60 id. 10; *Comm. v. Evans*, 132 Mass. 11; *State v. Smyth*, 14 R. I. 100.) The facts alleged in the indictment are sufficient to constitute a crime. (*Comm. v. Dana*, 2 Met. [Mass.], 341, 342, 343; *State v. Kesserling*, 12 Mo. 565; *Whiting v. State*, 14 Conn. 487.) An indictment for a statutory offense need not negative an exception in a proviso. If the defendant comes within that provision he must show it. (*People v. Walbridge*, 6 Cow. 513; *Fleming v. People*, 27 N. Y. 329; *Jefferson v. People*, 101 id. 19.)

ANDREWS, J. The third section of the act, chapter 183, of the Laws of 1885, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," supplementary to and in aid of chapter 202 of the Laws of 1884, entitled "An act to prevent deceptions in sales of dairy products," provides, among other things, that "No person or persons shall sell, supply or bring to be manufactured, to any butter or cheese manufactory, any milk diluted with water, or any unclean, impure, unhealthy, adulterated or unwhole-

Opinion of the Court, per ANDREWS, J.

some milk," etc., and declares that whoever violates the provisions of the section shall be guilty of a misdemeanor.

The indictment in this case "accuses the defendant of the crime of watering milk and bringing the same to a manufactory for the purpose of making the same into cheese," and charges "that the said Hanford West, at the town of Sardinia, in the county of Erie, on the eighth day of July, in the year one thousand, eight hundred and eighty-six, did wrongfully, unlawfully and knowingly supply and bring to be manufactured into cheese, to a cheese manufactory then and there situate, a certain quantity of milk, to wit: ten gallons, which said milk was then and there diluted with water; the said Hanford West then and there bringing the said milk so diluted to the factory for the purpose of having the same manufactured into cheese, contrary to the form of the statute," etc. The defendant demurred to the indictment and the only question presented is, whether the indictment charges a criminal or indictable offense. The indictment follows the language of the statute, and the general rule is well-settled that an indictment for a statutory offense, and especially when the offense is a misdemeanor, charging the facts constituting the crime, in the words of the statute, and containing averments as to time, place, person and other circumstances to identify the particular transaction, is good as a pleading and justifies putting the defendant on trial. (Wharton's Crim. Law, § 364; *People v. Taylor*, 3 Denio, 91.) But this rule presupposes that the statute creating the offense is a valid exercise of legislative power. The validity of the statute in question is assailed on the ground that it converts what is or may be an innocent act into a criminal offense, and that it is a restriction upon that natural liberty of every owner of property to use it in any lawful way. The power of the legislature to define and declare public offenses is unlimited except in so far as it is restrained by constitutional provisions and guaranties. A legislative act is presumptively valid, and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the Constitution of the State or the United

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States which it violates, before its operation can be stayed or the court be called upon to pronounce it void. (*Bertholf v. O'Reiley*, 74 N. Y. 509.) It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was before the statute lawful or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality. The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action, but nevertheless the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government with which courts cannot interfere. The provision in the third section of the act of 1885, now in question, is, we think, a valid exercise of legislative power. The act, as the title indicates, was aimed at the prevention of frauds in dealings in dairy products and the preservation of the public health. The prohibition in the third section against supplying or bringing to any butter or cheese manufactory milk diluted with water, to be manufactured into butter or cheese, does not make a fraudulent intent a necessary ingredient of the crime. It puts upon the person bringing or supplying milk to a butter or cheese manufactory the risk of ascertaining that the milk is pure. It is well known that the system of manufacturing butter and cheese in factories established for the purpose is very common, and this provision of the act of 1885 was doubtless designed for the protection of persons interested in the common enterprise against fraudulent practices, which should unduly enhance the gains of one to the injury of others. This purpose is not in terms expressed in the title of the act or in the section in question. But this was not necessary. The act of mixing water with milk intended for a butter or cheese factory could

Opinion of the Court, per ANDREWS, J.

seldom be committed except for a fraudulent purpose. It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted. It is sufficient if it enacts a plain and definite rule not inconsistent with fundamental principles. An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed therein. We are referred to no constitutional provision in support of the alleged invalidity of the statute in question, except the time-honored and memorable declaration that no person shall be deprived of life, liberty and property without due process of law. The act in question invades neither life, liberty nor property. It destroys no existing property (*Wynehamer v. People*, 13 N. Y. 378); it deprives no one of the right to obtain an honest livelihood (*In re Jacobs*, 98 N. Y. 98), and it curtails no one in the exercise of any right except the right to do an act which under ordinary circumstances could only be done with a fraudulent purpose. It is said that the prohibition in the third section extends so far as to make it criminal for a dairyman, owning and conducting a butter or cheese factory for the manufacture of butter and cheese from milk furnished exclusively by himself, to supply the factory with milk from his own cows mixed with water. This would not be a reasonable construction of the act; and if such a supposed state of facts exists in this case it is matter of defense on the trial, and it was not necessary to negative their existence on the face of the indictment. (*Comm. v. Dana*, 2 Met. 329, 341; *People v. Walbridge*, 6 Cow. 512, 513; *Fleming v. People*, 27 N. Y. 329.) The following authorities tend to sustain the views above expressed on the main question considered: *People v. Cipperly* (101 N. Y. 634); *People v. Arensberg* (105 id. 123); *Phelps v. Racey* (60 id. 10); *Comm. v. Waite* (11 Allen, 264); *Comm. v. Evans* (132 Mass. 11).

We think the judgment is right and should be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN M. SCHUYLER, Appellant.

106	298
129	655
106	298
150	299

Where a party seeks to exclude the testimony of a physician under the provision of the Code of Civil Procedure (§ 834), forbidding a physician from disclosing information he "acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity," the burden is upon such party to bring the case within the provision, he must make it appear not only that the information which he seeks to exclude was acquired by the witness in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity.

Upon the trial of an indictment for murder, where the defense was insanity, the prosecution called as a witness, B., who was a physician of the jail where defendant was confined for six months prior to the trial. B. testified that he was employed by the board of supervisors, and as such had medical charge of all prisoners in the jail; that he examined defendant at the request of both parties and "kept an eye on the case;" that he saw to the defendant, as he did to others, when he needed it. There was no proof that defendant was at any time sick during the six months, or that the witness was ever called to attend upon or prescribe for him as a physician. A hypothetical question was then put to the witness, from which was excluded all personal knowledge he had of the defendant, but which was based entirely on facts which occurred before defendant came to the jail, and the witness was requested to answer, without any reference to anything, except to the facts stated as to whether the defendant was sane or insane when he committed the act. The witness stated that it was very questionable whether in answering he could, and he was unwilling to say that he could, exclude the knowledge he had obtained while defendant was in jail. The question was objected to as incompetent under said provision and the witness allowed to answer. He answered "sane." *Held* (RAPALLO and ANDREWS, JJ., dissenting), that the evidence was competent; that even if the witness was influenced by the knowledge he acquired by seeing the defendant in jail, this did render his testimony incompetent. On cross-examination the witness stated he thought it was a practical impossibility to eliminate from his own mind the convictions formed as the physician of the prisoner and thus answer the question. On being reminded that he had answered, he stated that he withdrew the answer and did not wish it to be treated as an answer. The district attorney objected. the court held it had not the power to strike out the answer and refused so to do. *Held* (RAPALLO and ANDREWS, JJ., dissenting) that as the witness was not bound to eliminate the knowledge

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he acquired as jail physician, if he could not, it did not render the answer incompetent; and so it was not error to refuse to strike it out. After the statements of the witness as to his knowledge of the prisoner and before the hypothetical question was put, the court stated that the witness could not give any testimony based upon any fact that he learned either from or in regard to defendant at any time when the relation of patient and physician existed. *Held*, that the erroneous assumption by the court that the mere fact that the witness was the jail physician created the relation of patient and physician between him and defendant, did not render the question incompetent; that an erroneous ruling in defendant's favor could not render incompetent evidence which, in its nature, was competent.

As to whether the said provision renders a physician incompetent to testify that his patient was free from disease of any kind, *quære*.

Also, *quære*, as to whether, when the patient calls witnesses to testify as to his mental condition, he does not waive his privilege under the provision and throw open the inquiry.

Defendant's wife was called as a witness in his behalf, and testified among other things, that the night before the commission of the crime defendant came home at nine o'clock sick at his stomach and with a severe headache; that he went to bed and she put a board at his feet so that by pressing against it he could press his head against the headboard, and that he lay there for hours. On cross-examination her attention was called to an occasion, the day after the homicide, when the district attorney and certain other persons specified were present, and she was asked if she did not say to the district attorney on that occasion that she had never seen anything strange or unusual in the conduct of her husband. Also, if she did not say "that he went to bed as usual the night before," or "that he went to bed and slept as usual." She denied having said anything of the kind. Subsequently one of the persons named was called as a witness by the prosecution, and his attention having been called by the district attorney to the occasion referred to, he was asked: "Did she then say to us that Mr. Schuyler went to bed about nine p. m. the preceding evening in his usually healthy condition and slept all night as far as she knew?" This was objected to, the objection overruled and witness answered, "she did." *Held*, that the evidence was properly received to contradict and discredit the defendant's witness; and that the evidence went no further than her examination fairly justified.

(Argued May 11, 1887; decided June 28, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment of the Court

Statement of case.

of Oyer and Terminer of Otsego county, entered upon a verdict convicting the defendant of the crime of murder in the first degree. (Reported below, 43 Hun, 88.)

The indictment charged the prisoner with having on the 2d of July, 1885, at the town of Morris, Otsego county, with a deliberate and premeditated design to effect her death, killed Amy Schuyler, by violently hurling her head against a wooden block, thereby crushing in a portion of her skull and thus causing her death. The defense was insanity.

The evidence, so far as material, is stated in the opinions.

Nathaniel C. Moak for appellant. When cross-examination shows evidence to be improper, it should be promptly stricken out and the wrong, as far as possible, repaired. (*Dunn v. Hewitt*, 2 Den. 637, 638; *Stebbins v. Cooper*, 4 id. 191, 192; *Hatch v. Pryor*, 3 Keyes, 441, 443; *Jennings v. Osborne*, 1 N. Y. 267, 269, 270; *Crane v. Crane*, 5 id. 423, 424, 425; *Barnett v. Williams*, 7 Kan. 339, 343.) A party is not bound to interrupt the examination of a witness called by his adversary in respect to a material matter, on a mere suspicion that the witness may be debarred by his position from testifying; he may await the cross-examination to bring out the facts, and if it appears thereby that the witness is incompetent, make his motion to have the testimony struck out. (*Loveridge v. Hill*, 96 N. Y. 222, 226, 227.) Under the circumstances to allow the jail physician to give an opinion, based even in part, on what he had learned from communications to and from defendant, or from observations made while acting as a physician to defendant, was illegal and improper. (Code of Civ. Pro., §§ 834, 836; Code of Crim. Pro., § 392; *People v. Murphy*, 101 N. Y. 126; *Renihan v. Dennin*, 103 id. 573; *Westover v. Aetna*, 99 id. 56; *Grattan v. Metropolitan*, 92 id. 274, 286, 287; 28 Hun, 430; *Edington v. Mutual*, 67 N. Y. 185; *Storrs v. Scongale*, 48 Mich. 395, 396; 12 N. West. R., 505.) Prior conversations between the defendant and his wife were not admissible in this case. (*People v. Lamb*, 2 Keyes, 371.) A layman

Statement of case.

when examined as to facts within his own knowledge bearing on the question of sanity, may be permitted to characterize the acts to which he testifies as rational or irrational. He may testify to the impression produced by what he witnessed. (*O'Brien v. People*, 36 N. Y. 282; *Clapp v. Fullerton*, 34 id. 195.)

Charles T. Brewer for respondent. The relation of physician and patient does not exist unless illness has been proved to exist at some time in the alleged patient. (*Renihan v. Dennin*, 103 N. Y. 573; *Westover v. Aetna Life Ins. Co.*, 99 id. 57; *Grattan v. Met. Life Ins. Co.*, 80 id. 286, 295; *Edington v. Mut. Life Ins. Co.*, 67 id. 189; *Dilleber v. Home Ins. Co.*, 69 id. 260; *People v. Murphy*, 101 id. 126; *People v. Stout*, 3 Park. 670.) The burden was upon the defendant to show, and that in the first instance, that the technical relation of physician and patient existed between these parties. (*Cary v. White*, 59 N. Y. 339; *Steele v. Ward*, 30 Hun, 560; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 571.) The hypothetical questions propounded to Dr. Babbitt were properly allowed. All the facts assumed having occurred before the witness ever saw the prisoner. (*Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Grattan v. Met. Life Ins. Co.*, 80 id. 281; *Staunton v. Parker*, 19 Hun, 57; *Steele v. Ward*, 30 Hun, 555; *Pierson v. People*, 79 N. Y. 433, 434.) The testimony of the prisoner's wife that after he got up from the table he took "this same child by the heels and threatened or attempted to strike it on the stove" was competent as part of the *res gestae* at the time of the killing, and as showing the *animus* of the prisoner toward the person killed. (*People v. Jones*, 99 N. Y. 668, 669; *Dunn v. State*, 2 Ark. 229; *Thorp v. State*, 15 Ala. 749; Roscoe's Cr. Ev. [7th ed.] 92; 3 Russ on Cr. [9th ed.] 228; *People v. Kern*, 61 Cal. 244; *People v. Shulman*, 80 N. Y. 373, *n*; *People v. Wood*, 3 Park. 684; *People v. Thompson*, 97 N. Y. 319; *Hope v. People*, 83 id. 418; *State v. Knapp*, 45 N. H. 156; *Hopkins v. Comm.* 50 Penn. St. 15; *Ford v. State*, 71 Ala. 396.) The

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fact of murder being established, the inability to discover the motive does not disprove the crime. (*Lake v. People*, 1 Park. Cr. R. 539-541; *McLain v. Comm.* 99 Penn. St. 99; *Goodwin v. State*, 4 Cr. Law Mag. 579; *State v. Green*, 92 N. C. 779; *Clifton v. State*, 73 Ala. 478.) The people were entitled to show the history of the defendant. (1 Wharton's Law of Ev. § 175; *Lake v. People*, 1 Park. 556, 557; *Hochrieter v. People*, 2 Abb. App. Dec. 363.)

Per Curiam. The able and satisfactory opinion pronounced in the court below, renders it unnecessary that much should be written now. A brief presentation of our views will be sufficient to justify the conclusion we have reached.

The killing by the defendant of his child was, upon the trial, undisputed, and his sole defense was insanity. The crime was committed on the second day of July, 1885, and the defendant was then twenty-seven years old. It does not appear that before that date he said or did anything indicating unsoundness of mind, nor does it appear that, at any subsequent time, he gave any sign whatever, by word or deed, of insanity. From the moment of the commission of the crime, all his acts and conversations were perfectly sane and rational. He at once recognized the moral quality of his act, and was perfectly aware that he had violated the law and was liable to be punished. Down to the trial of this action, it does not appear that he ever claimed that he killed his child while unconscious or irrational, or laboring under any delusion; but his avowal was that he had done it in a passion. Four physicians were called on the part of the defense, who testified that they had examined the defendant, and in answer to a hypothetical question, assuming such facts justified by the evidence as his counsel saw fit to insert therein, stated that he was insane at the date of the crime. Four physicians were called upon the part of the people, who, in answer to a hypothetical question put by the district attorney, which contained such facts justified by the evidence as he saw fit to insert therein, testified that he was sane. There was thus a

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question of fact as to the defendant's sanity for the jury; and with their determination thereof, based, as we believe, upon a preponderance of the evidence, we have no occasion or power to interfere.

It appeared that the crime was committed when the defendant was in a great passion. Upon the evidence there was ground for claiming that there was the absence of that deliberation and premeditation which are the necessary elements of the crime of murder in the first degree. But it was not claimed upon the trial that there was not sufficient evidence of the presence of these elements for the consideration of the jury, and their determination, justified by the evidence, also concludes us.

During the progress of the trial numerous exceptions to the rulings of the court were taken on behalf of the defendant. We have carefully examined and considered them all, and we agree that all but two are unfounded; and as to the two only, there is difference of opinion among the members of this court. To them, therefore, we will briefly direct attention. Among the expert witnesses called on behalf of the people, to give evidence as to the condition of the defendant's mind at the time of the crime, was Dr. Bassett. He testified that for six months preceding the trial he was the jail physician, employed by the board of supervisors; that as such he had medical charge of all the prisoners in the jail; that during that time he examined the defendant at the request of both parties, and "kept an eye on the case" and had him under his observation; that he assumed the obligation of attending the prisoners in the jail and "saw to the defendant as he did to the others, when he needed it." After these statements, the court remarked to the district attorney: "You cannot give any testimony based upon any fact that he learned either from the defendant or in regard to the defendant at any time when the relation of patient and physician existed." A hypothetical question was then stated to the witness, from which was excluded all knowledge which he had of the defendant personally, and which was based

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entirely upon facts which occurred before the defendant came to the jail, concluding as follows: "Assuming those facts to be proved, and without any reference to anything except those stated, was this man, if he did the act, sane or insane at the time he committed that act?" This question was objected to on the part of the defendant "because the witness held the confidential relation of physician and patient; that it is practically impossible to eliminate the position in which he stands and decide upon a question in this case, and the question put is in this case, as they claim upon the facts in this case, and therefore that the testimony of this witness was incompetent and improper." The objection was overruled, and the witness answered, "Sane." It is claimed that this question and answer were incompetent under section 834 of the Code, which provides as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity." When a party seeks to exclude evidence under this section the burden is upon him to bring the case within its purview. He must make it appear, if it does not otherwise appear, that the information which he seeks to exclude was such as the witness acquired in attending the patient in a professional capacity not only, but he must also show that it was such as was necessary to enable him to act in that capacity. (*Eddington v. Aetna Life Ins. Co.*, 77 N. Y. 564.) Here there was no proof that the defendant was at any time sick during the six months in which the witness was the jail physician, or that the witness ever attended or prescribed for him as a physician, or that he derived any of the information upon which the question or answer thereto could be based while attending him as a physician. It was assumed by the defendant's counsel, and by the court, that the mere fact that the witness was the jail physician created the relation of patient and physician between him and the defendant, and that the mere existence of that relation was sufficient to exclude

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evidence. But the assumption by the court was beneficial rather than harmful to the defendant. It restricted the examination of the witness, and embarrassed him in giving his evidence. An erroneous ruling in defendant's favor could not render incompetent evidence which in its nature was competent, and the case is like that of a correct decision made by a judge under a misconception of the law. It does not appear and cannot be inferred that the defendant, in consequence of this erroneous assumption, omitted to prove anything which he otherwise could or would have proved. The inquiry related to the condition of the defendant's mind at the time of the commission of the crime, about eleven months before the trial, and not to anything which occurred or appeared during the time he was confined in the jail; and the witness was not asked to testify as to the mental condition of the defendant while in the jail, or to disclose any information he acquired while he was there. He did not, in fact, disclose any such information, and it is utterly impossible for us to perceive how the evidence of the witness could have been excluded under that section. It is true he said it was very questionable whether he could exclude, in answering the hypothetical question, the knowledge which he had obtained of the defendant while in the jail, and that he was unwilling to say, in giving his opinion as to the condition of the defendant's mind at the time of the commission of the crime, that he could eliminate from his mind such knowledge. But he nowhere in his evidence intimated that he had any knowledge which he had obtained from the prisoner while attending him in a professional capacity, or that he had received any information whatever from him which was necessary to enable him to attend him as a physician, or that he ever prescribed for him as a physician.

The hypothetical question was, therefore, in any view of the case, a competent question to put. It does not appear that, in answering it, the witness took into consideration any improper elements, and if he was influenced by the knowledge he acquired of the defendant by

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seeing him in jail, that circumstance did not render the evidence incompetent. He was not bound to eliminate from his mind that knowledge in answering the question, and even if he could not, that did not render his answer incompetent. A proper question having been put and answered, the court was not, upon anything appearing in the record, bound to strike it out. The objection, therefore, to the evidence given by Dr. Bassett and the rulings of the court in reference thereto, present no error requiring the reversal of this judgment.

The object of the section referred to was to prevent the disclosure by a physician of his patient's ailments and infirmities, and it may be queried whether it makes him incompetent to testify that his patient was free from disease of any kind; and was not Dr. Bassett, therefore, competent under any view of the case, to testify that the defendant was not insane, but sane? And when the defendant called experts, who had examined him, to testify as to his mental condition and to show that he was insane, did he not waive his privilege under the section referred to and throw open the inquiry as to his mental condition? In other words, can a party himself upon a trial expose his ailments and make them the subject of inquiry, and then object that his physician shall tell anything he knows about them? We do not deem it important to answer these questions at this time, and leave them to be solved when the exigencies of some future case may require it.

The defendant's wife was called as a witness in his behalf and testified, among other things, that the night before the commission of the crime the defendant came home at nine o'clock, sick at his stomach, and with a severe headache; that he undressed and went to bed and that she put a board at the foot of the bed so that he could press his feet against it while his head would be against the headboard, and that he lay there for hours. On her cross-examination her attention was called to a time when the district attorney and one Merrills were present with her at the court house, and she recollected having a conversation there. She was then asked questions and gave answers as follows: "Did you say to Mr. Barber (the district

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attorney), in the presence of Mr. Merrills that you had never seen anything strange or unusual in John's conduct?" A. "I don't remember of saying so." Q. "And that he was not affected by the ball play?" A. "I never said so." Q. "And that he went to sleep as usual the night before the homicide, and ate as usual?" A. "No, sir, I did not say that as I remember, because it is not true; I don't remember of saying it." Her attention was then called to another occasion, the day after the commission of the crime, when the district attorney, Mr. Fairchild and Mr. Sweet were present, and she was asked questions and gave answers as follows: Q. "Did you say then to the district attorney in the presence of Mr. Fairchild and Mr. Sweet that you had never seen anything strange or unusual in John's conduct?" A. "I do not think I said so." Q. "That he went to bed as usual the night before?" A. "I did not say so, for it was not true." Q. "You deny now that you said to Mr. Barber that he went to bed the night before and slept as usual?" A. "I don't remember talking to Mr. Barber the next day; I remember talking to him in his office in January." Q. "Did you say that to him there?" A. "No, I don't believe I did." Q. "You didn't say anything of the kind?" A. "I don't believe I said so at all." Mr. Sweet was subsequently called and testified that on the occasion referred to on the cross-examination of Mrs. Schuyler, when he, Fairchild and the district attorney were present, the day after the commission of the crime, she stated that she never saw anything peculiar in her husband before that time, and he was asked this: Q. "Did she say that the evening before he came home, he went to bed as usual, and slept all night, so far as she knew?" And he answered, "yes, sir; she did." This question and answer were not objected to. Subsequently Fairchild was called as a witness, and his attention being called to the interview with Mrs. Schuyler, the day after the homicide, he was asked this question by the district attorney: "Did she there say to us that Mr. Schuyler went to bed about nine P. M. the preceding evening in his usually halthy condition and slept all night, so

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far as she knew?" This was objected to by the defendant as improper and incompetent, and that there was no ground laid for the contradiction of Mrs. Schuyler, and any statements she then made could not be binding upon or used against the defendant. The objection was overruled, and the witness answered "She did." Merrills was called as a witness and his attention being directed to the interview with Mrs. Schuyler when the district attorney was present, was asked this question: "Did she say to me (the district attorney), in your presence on that day that she had never seen anything strange or unusual in John's conduct?" This was objected to by the defendant's counsel as incompetent and improper. The objection was overruled and the witness answered: "I think she said she had not, more than he had headaches once in a while, she spoke about that." He was then asked this question: "Did she say that he went to bed and slept as usual the night before the homicide," and he answered, "I think she did." In the examination of these witnesses, Sweet, Fairchild and Merrills, no error was committed. The evidence was given merely for the purpose of contradicting and discrediting Mrs. Schuyler. She had testified on her direct-examination that the defendant came home the night before the crime, sick; that he undressed and went to bed and that she put a board at the foot of the bed so that he could press his feet against it with his head against the head-board, and that he lay there for hours. The purpose of the district attorney was to show that she had made statements out of court at variance with this evidence, and the object of her cross-examination was to show that she had stated out of court that, instead of going to bed in that unusual manner, he went to bed as usual the night before and slept as usual. After she had substantially denied making such statements or any statements of that kind, these witnesses were called for the purpose of contradicting her, and we think no error was committed in receiving their evidence. That evidence went no further than her examination fairly justified, and it was a proper contradiction of what she had testified to.

Dissenting opinion, per RAPALLO, J.

Upon the whole case we do not believe that any error was committed upon the trial prejudicial to the defendant, and the judgment should be affirmed.

RAPALLO, J. (dissenting). The deceased was a daughter of the prisoner and his wife, Minnie Schuyler, and was about three years of age. Evidence was given on the part of the prisoner that he had resided at Morris for four or five years and was a quiet, peaceable and gentlemanly man. This was not controverted by the prosecution. It appeared by the evidence of Minnie Schuyler, the mother of the deceased, that on the morning of the second of July, on leaving his home for his place of business, which was near by, he kissed her and his two children, as was his custom, and that he was always kind to the children, and particularly to Amy, for whom he showed partiality. When he went away his wife asked him to bring home some berries.

The evidence on the part of the prosecution showed that he did not return until about two o'clock in the afternoon, which was much later than his usual hour for dinner; that an altercation immediately ensued between him and his wife, which was followed by them throwing dishes at each other; that he then struck her and she ran out into the yard through the wood-shed which was in the rear of the house, he following her. Their next door neighbor, Sweet, saw the affray through the window and cried out to him "John, hold on." As he spoke the prisoner looked up at the witness, and Mrs. Schuyler ran out of the wood-shed door, the prisoner right after her; as he came out of the door he said to witness "this is a family affair and neighbors need not interfere;" witness then reproved him for striking his wife; the prisoner denied that he had done so; the witness repeated the charge, and the prisoner again denied it; Mrs. Schuyler then spoke and said, "John, you lie, you 'did strike me," and she pointed to blood upon her face; witness then turned away and the next thing he saw was Schuyler going back into his house; he went a few steps and came out again; she, Mrs. Schuyler, was then going

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away from the wood-shed door towards the road and the prisoner asked her whether she was going to take care of those young ones, and she said "no, I am not;" other witnesses said her reply was "no, I am not, while you are here;" he then turned back and entered the wood shed door out of Sweet's sight, and the next thing Sweet saw was the prisoner coming out of the wood-shed door holding the child by both its ankles, head down, and he struck its head three times on a large wooden block which stood near the wood-shed.

The mother, Sweet and several neighbors, who had been attracted by the fracas, were then in sight, and their testimony substantially agrees with that of Sweet. There was no claim that the prisoner was intoxicated. As he dashed the child's head against the block he exclaimed: "See here." The space of time which elapsed between the prisoner entering the door of the wood-shed and reappearing with the child was very brief. Sweet testified that it was not more than four or five seconds, and this was not controverted. It all happened while the wife was walking from the wood-shed door toward the road, and she had gone but a short distance when the child was killed. After having killed his child he laid the body down by the block and walked to the front of the house, then turned back and took the body in his arms and carried it into the house, laid it on a lounge and then went to the front of the house and said that he had killed the baby and expected to hang for it. He asked some one to go in and close its eyes and mouth and to look after the younger baby, and proceeded toward the village. Meeting Mr. Gardner, a deputy sheriff, he surrendered himself, and said to him that he had killed his child, and that it would not have happened but for the neighbors. He was taken to a hotel, where he remained in custody several hours while the papers for his commitment were being prepared. During this time he conversed with several persons, and he was afterwards conveyed by wagon, in charge of Gardner and Mr. Taylor, a former deputy sheriff, to the jail, twenty-two miles distant, occupying about four hours in the trip. His declarations to these

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witnesses, as well as to those with whom he conversed at the hotel, were put in evidence by the prosecution.

At the hotel he said to Hall: "I have killed my child and expect to hang for it." He began crying and lamenting, saying: "I have killed that dear child, and the child was not to blame." "My poor little Amy; I have killed my child, my poor little innocent child;" that his temper got the best of him. To Dr. Hall he said: "They say I have killed my child; is she dead?" He also said if it had not been for Sweet it would not have happened. Ralph Murdock, who appears to have been an intimate friend of the prisoner, came to see him at the hotel, and the prisoner put his arms around his neck and said: "Ralph, don't be down on me for this; it was done in a passion, and what's done can't be undone;" and repeated: "It was a sad, sad caper;" and later on he said that Sweet caused it. When told that he would not be tried before January, he expressed regret that he would have to wait so long. In the wagon he sat with Taylor on the back seat, and was handcuffed to him. He was sobbing and crying and repeatedly exclaiming, "Is it possible that I have killed that poor little child?" Taylor testified that the prisoner slept on the way, or seemed to be asleep, and would start up occasionally and speak of his child every time he roused up, and moan: "Oh, my poor little child."

Minnie Schuyler, the wife of the prisoner, was called for the defense, and related the origin of the quarrel with her husband on the occasion in question. She testified that when he came home to dinner she stood in the front door, and he came along swinging his pail in such a manner that she thought he had no berries in it (in which she proved to have been mistaken), and she reproached him with being so late and keeping her waiting at a time of day when she had so much to do. An angry altercation then ensued. She says he looked so strange, so funny, that she accused him of having been drinking, which he denied. He sat down and she told him to help himself to the dinner. He looked very staring, eyes glassy, very pale and lips blue. She made some remark,

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he picked up a cup and saucer and threw it, and she picked up a saucer and threw it at him, and he then grabbed her. She told him not to talk so loud as the neighbors would hear, and he shut down the window. She ran into the back room and he struck her and she fell. Then Sweet spoke to him, and she relates the rest according to the testimony of the witnesses for the prosecution. She says that she told him twice that he lied, and that she spoke unkindly to him, very unkindly. She was asked whether from what she saw of him then and heard him say she believed that he was rational or irrational then, but on objection by the prosecution the question was excluded. The witnesses for the prosecution describe him as having looked very pale at the time of the commission of the crime.

The evidence on the part of the defense to sustain the plea of insanity was to the effect that when he was eleven years of age (he was twenty-seven at the time of the killing) he had a sun-stroke, from the effect of which he was confined to his bed for several days; that he had been a weakly child from his birth, and was troubled generally with costiveness; that he had been beaten on the head with stones; that he had been brought home insensible from other injuries; that there were some depressions in his skull; that ever since the sun-stroke he had suffered severe headaches which caused him to manifest great pain, accompanied and followed by pallor; that a week or ten days before the homicide, in playing ball, he had violently butted his head against that of another person and was thereby felled to the ground with much force; that from that time to the second of July he complained of severe headaches, and his wife testified that on the night before the homicide on retiring he complained of a severe headache, and when he retired she procured for him a board against which he pressed his feet while he pressed his head against the head board of the bed, and lay thus for several hours. She describes these headaches as very violent, and his actions as strange while he was suffering from them. On the morning of the day of the homicide, which was a hot day,

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he worked for a considerable time hoeing in the garden, in the sun, wearing a black skull cap. Afterwards, during the morning, he had a heated discussion on politics with a neighbor, in which he became much excited, and was in this condition when he came home, and was received by his wife in the manner which she described. There was a great deal of testimony on these and other points and on the part of the defense, five physicians, Drs. Hall, Pilgrim, Crane, Hills and McClellan, testified, four of them, in answer to a hypothetical question, detailing facts in evidence, and which was not objected to by the prosecution as assuming any fact not in evidence, and Dr. Hall testifying from what he saw on the day of the homicide, that, in their opinion, he was insane at the time of the commission of the act, two of them saying they had no doubt about it. Three of these physicians were acquainted with the prisoner, and had seen him frequently at his residence, but they agreed that when they saw him, after his arrest, he was sane, their theory being that his brain was diseased in a manner liable to develope into insanity under peculiar excitement, and Dr. Hall expressing the opinion, on cross-examination, that he was delirious at the time of the homicide. This evidence was met by the prosecution by the testimony of four physicians who had never seen the prisoner until after he had been confined in the jail, and who, in answer to a hypothetical question framed by the prosecution, and which was objected to by the defense as assuming facts not in evidence, and omitting facts in evidence, expressed the opinion that he was sane. To some of this evidence exceptions were taken by the defense which are referred to hereafter. Exception was also taken to the admission of evidence as to the declaration of the mother of the deceased for the purpose of impeaching her credibility, which is also set forth in detail.

The atrocity of the act committed by the prisoner was such as necessarily to excite the indignation of the jury as well as of the court, but its unnatural character, in view of the previous character of the man as a quiet and peaceable person, and

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of his affection for his child render it difficult, if not impossible, to conceive that he could have been, at the time, so far in possession of his faculties as to be capable of the deliberation which, by our statute, is made an essential element of the crime of murder in the first degree.

There was undoubtedly sufficient evidence of the intent to kill, and sufficient also to satisfy the former statutory requirement of premeditation, but in view of the conceded facts, and of the position taken by the prosecution, no case was made for the submission to the jury of the question of deliberation. The evidence as well as the claims of the prosecuting attorney rebut the idea that the prisoner deliberately premeditated and intended the death of his child and clearly characterize the act as one of momentary frenzy resulting either from temporary insanity, or anger working on an enfeebled brain to such a degree as to render the patient incapable for the moment of deliberating or exercising his reasoning powers.

His conduct and exclamations after he had recovered from his paroxysm, and which were put in evidence by the prosecution, show that in the commission of the act he did violence to his own nature and affections. His lamentations over the death of his innocent child, the manner in which they were expressed, so soon after the commission of the fearful deed, his anxiety that the punishment which he supposed that he merited should not be deferred, all show (and this is the evidence on the part of the prosecution) that he was not himself when he committed the act, and that he condemned himself as soon as he returned to consciousness. No intoxication is claimed by the prosecution or could be claimed.

The claims of the prosecution on the trial, as shown not only by the examination of the witnesses, but as summarized in the charge of the judge, were in accordance with what the prisoner said to his intimate friend Ralph Murdock, when at the hotel after the arrest. "Ralph, don't be down on me for this, it was done in a passion, and what's done can't be undone." The learned judge in charging the jury stated the claims made by the prosecution and the defense. The

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defense claimed that the pallor of the prisoner was one of the evidences of his insanity. The judge stated to the jury that it was claimed by the prosecution that the prisoner at the time "was angry, that he was pale from anger, that the expression of his eyes and his demeanor were from anger; that all the symptoms and appearances established by the evidence in the case were the symptoms of anger rather than those of insanity."

Assuming this to be all true as claimed by the prosecution, taken in connection with the undisputed testimony of Sweet, that between the time of the last provocation, which appears to have incensed the prisoner, when he re-entered the wood shed, and the time when he reappeared holding the child by its ankles and dashing its head upon the block, not more than four or five seconds elapsed; that it all happened while his wife was walking away from the wood shed towards the road and had proceeded but a very short distance, that the prisoner was pale from anger, and considering these circumstances in connection with the other evidence on the part of the prosecution, is it possible to say that the evidence was such as to authorize a verdict of deliberation and premeditation or even the submission of that question to the jury.

A man pale with rage seizes on the instant his favorite child of tender years, and publicly, in the presence of his wife and neighbors, brutally dashes its head against a block, and immediately afterwards realizes what he has done, invokes death as the proper punishment for his crime, and pathetically laments the death of his child; and this a man of ordinarily quiet and peaceable disposition. If these facts do not indicate temporary insanity in a person whose physical condition is such as to render him susceptible to such a paroxysm, they at least show such a momentary suspension of his moral faculties and reasoning powers as to render him, for the time, incapable of that deliberation which the law demands that the prosecution should establish.

But, strange to say, that point was not taken on the part of the defense, and no exception raising it is contained in the

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case. This court is, consequently, powerless to correct any error which may have been committed in that regard; and although, in my opinion, a conviction of murder in the first degree was not justified under the conceded facts, and the verdict should have been in the second degree, irrespective of the defense of insanity, the only remedy for this error rests with the executive.

With regard to the defense of insanity, the evidence was such as would have justified a finding either way; consequently the verdict of the jury is conclusive upon this court, unless some of the exceptions taken by the defense are sustained. In my judgment, under the circumstances of this case, these exceptions should be considered with careful attention; not because there is anything in the case which should incline as favorably towards the prisoner, but because, in my judgment at least, his conviction of murder in the first degree is not warranted by the present statute, and if any legal ground exists for having him retried and a proper verdict rendered, it should be made available.

One of the four physicians examined as experts on the part of the prosecution, Dr. Bassett, was the physician employed in the jail where the prisoner was confined after his arrest for the homicide, and it was his duty to attend and prescribe for the prisoners when ill. He had never known the prisoner before, and did not know his antecedents, upon which the physicians called by the defense had predicated their opinion that the prisoner's brain was diseased. Dr. Bassett testified that he had been for forty-two years a physician and surgeon, and had examined the prisoner while in the jail, commencing about the first of December (six months after the homicide), and had kept his eye on the case ever since; that he was the physician of the jail, appointed in November, and had acted as such down to the time of the trial; that he saw to the prisoner whenever he needed it, as he did to the other prisoners; that he assumed the obligation of attending to those patients in the jail; that the prisoner was one of them whenever he required attendance, and that

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that relation still existed. Thereupon the prisoner's counsel objected to any testimony of the witness, and the court instructed him that he could not give any testimony based upon any fact that he learned either from the prisoner or in regard to him, at any time when the relation of patient and physician existed. The district attorney then asked the following question: "Eliminating from your answer all consideration of any evidence that you obtained as to his condition from any talk with him, or from anything that you observed in him *when you were attending him as jail physician*, you may state *is he sane or insane?*" The question being objected to, the court asked the witness: "Is it possible for you to eliminate the knowledge you have obtained there?" The witness answered, "It is very questionable." The court then said: "I guess we will not take the evidence; I don't believe he can do it." The district attorney then asked him whether he could, and the witness answered that he was not willing to say that he could separate the two; that it intermingled in such a way that he did not think he could separate them. The district attorney then read to the witness a long hypothetical question of five printed pages, different from that which had been asked of the witnesses for the defense, and asked him to throw out of the case everything except the facts which he there assumed to be proved, and, after reading the question, asked the witness: "Assuming those facts to be proved, and without any reference to anything except those stated, was this man, if he did the act, sane or insane at the time he committed that act?"

This question was objected to on the ground that it assumed facts not proved, specifying them. Also because the witness held the confidential relation of physician and patient and it was practically impossible to eliminate the information obtained in that relation.

The court overruled the objection and allowed the question, and the witness answered "sane." Being cross-examined the witness stated that he thought it was a practical impossibility for him to eliminate from his own mind the convictions

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formed as the physician of the prisoner, and thus answer the hypothetical question. Being reminded that he had answered it, he said that when it was ruled that he should answer he supposed that he must answer, that he withdrew his answer and did not wish it to be treated as an answer. The counsel for the prisoner asked the court to strike out the answer. The district attorney objected, and the court held that it could not strike out the answer and the prisoner's counsel excepted.

I think the substance of the statement of the witness was that it was impossible for him to answer the hypothetical question without being influenced in his answer by the convictions he had formed while attending the prisoner as his physician. That consequently his testimony had been based in part upon what he had thus learned, and that when this was made to appear by the cross-examination, the judge erred in holding that he could not strike out the answer which the witness had given, as he supposed, under compulsion, and that the court not only had the power to strike it out, but ought to have done so. The witness was the most experienced physician examined in the case, and his testimony must have had great weight with the jury.

The ruling of the trial judge is sought to be sustained on the ground that it was not distinctly proved that the witness had attended the prisoner as his physician. I do not think that this is a fair criticism. There was no suggestion, even, upon the trial of any such ground. If there had been, then the proof on this point could have been made still more explicit than it was, for Dr. Babbitt, the predecessor of Dr. Bassett, as jail physician, and who acted as such during the first five months of the prisoner's confinement, stated that he prescribed for the prisoner several times, and like others, considered him his patient. Dr. Bassett testified that he saw to the prisoner whenever he needed it as he did to the other prisoners, that he assumed the obligation of attending those patients in the jail, and the prisoner was one of them, whenever he required attendance, and that relation still existed. The objection was placed on the express ground that the con-

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fidential relation of patient and physician existed between the prisoner and Dr. Bassett and this was in no way disputed, but on the contrary the district attorney in his question assumed that that relation existed, for he asked the witness to eliminate from his mind information obtained by Dr. Bassett while he was attending him as physician, and the court also assumed and held that the relation had been sufficiently proved, first by excluding the examination of Dr. Bassett, and next by asking him whether it was possible for him to eliminate the knowledge then obtained, and at first excluding the witness on the ground that the court did not believe that he could eliminate the privileged matter. After all this it would have been idle for the prisoner's counsel to go into details to show that Dr. Bassett had attended the prisoner as his physician, a fact which appeared to be conceded by court and counsel. It would be very unfair to deprive the prisoner of the benefit of his objection on the ground that he had not been sufficiently definite in his proof of the fact thus assumed and conceded.

I think there was also error in the admission of the question to George W. Fairchild, a newspaper editor, who had testified that he went with the district attorney, Mr. Barber, to Mr. Sweet's house to see the prisoner's wife, and there had a talk with her in presence of Mr. Sweet. The district attorney then asked the witness the following question: "Did she then say to us that Mr. Schuyler went to bed about nine p. m. the preceding evening in his usual healthy condition and slept all night as far as she knew? The prisoner's counsel objected to the question as improper, incompetent, and that no ground had been laid for the contradiction of Mrs. Schuyler, or any statements she made there, and that they could not be binding upon or used as evidence against the prisoner. The objection was overruled, the defendant excepted and the witness answered, "She did."

I think this exception was well taken. The only ground laid for the question as a contradiction was in the question to Mrs. Schuyler, "Did you say to Mr. Barber, in the presence

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of Mr. Fairchild and Mr. Sweet, that he went to bed as usual the night before," to which she made a negative answer.

A contradiction of that answer would not have been very material, but the statement, as testified to by the witness, and as recited in the question, was a very material contradiction and entirely different from that as to which she had been asked on her cross-examination. She had testified to his severe headache that night and her arranging a board against which to brace himself so as to press his head against the head-board of the bed, and other facts quite inconsistent with his then being in his usual health, and she had not been asked as to any statement in regard to the state of his health when he went to bed.

The prisoner's wife was a very important witness in his behalf, and many facts depended upon her testimony alone. Any impeachment of her credibility was, therefore, highly prejudicial to the defense.

For the errors pointed out I think there should be a new trial on which the degree of the crime may be considered.

All concur for affirmance except RAPALLO, J., who reads for reversal, and ANDREWS, J., dissenting

Judgment affirmed.

Statement of case.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES KIBLER, Appellant.

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Under the act of 1885 (Chap. 183, Laws of 1885, as amended by Chap. 458 of that year), prohibiting the sale of adulterated milk; and making the violation of the prohibition a misdemeanor, criminal knowledge or intent forms no element of the offense.

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All that is requisite to establish the offense is to show a sale of milk falling below the standard fixed by the act and coming within its definition of adulterated milk.

If the sale was of skimmed milk, and if such sale is within the exception of the statute (as to which *quæro*), this is matter of defense.

The act as thus construed is constitutional

(Argued June 13, 1887; decided July 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment of the Court of Sessions in and for the county of Erie, entered upon a verdict convicting defendant of a misdemeanor.

The nature of the offense and the material facts are stated in the opinion.

Giles E. Stilwell for appellant. To make an act criminal the intent must concur with the act. (7 T. R. 509; 14 14 Gray, 65-67; Bishop on Stat. Crimes, 231; 7 Humph. 148; 7 B. Monroe, 247; 23 W. Dig. 364.) An honest mistake or ignorance, not connected with criminal carelessness or negligence or even less than criminal, a mistake or ignorance which no reasonable care or caution would have avoided does, under any humane law, constitute a defense and authorize a submission to a jury as to the guilt or innocence of the accused. (*People v. Kerin*, 23 W. Dig. 364.)

William P. Quin for respondent. The people were simply bound to prove that the milk was below the standard fixed by the statute. (*People v. Cipperly*, 37 Hun, 323; *Comm. v. Keenan*, 139 Mass. 195.) If milk below the

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standard was actually sold, the care or precaution taken by the appellant in his business could be no defense under this statute. (*People v. Schaeffer*, 41 Hun, 25; *People v. Muhaney*, id. 28; *People v. Noble*, 1 N. Y. Cr. R. 459; *People v. Storm*, G. T., 2d Dept.; *People v. Hill*, id. 1st Dept.; *U. S. v. Bayard*, 16 Fed. R. 384; *Comm. v. Farren*, 9 Allen, 489; *Comm. v. Smith*, 103 Mass. 444; *Comm. v. Wentworth*, 118 id. 441, *Comm. v. Evans*, 132 id. 11; *Comm. v. Keenan*, 139 id. 195; *Farrell v. State*, 30 Am. R. 617-620, n.; 33 Alb. Law J., 79, January 2, 1886; 19 id. 84; Wharton's Cr. Law, § 88.) The authorities cited fully sustain the constitutionality of the section without knowledge and intent as elements of its violation. (*People v. Arensberg*, 103 N. Y. 399; *State v. Smyth*, 14 R. I. 100; *State v. Newton*, 45 N. J. 469.) It was unnecessary for the people to prove the cause of the milk being below the standard. (*Fleming v. People*, 27 N. Y. 334; *Schwab v. People*, 4 Hun, 523; *Harrison v. White*, 81 N. Y. 532.)

FINCH, J. The appellant was convicted of selling adulterated milk under the provisions of chapter 183 of the Laws of 1885, as amended by chapter 458 of that year. Section 1 provides that "no person or persons shall sell or exchange or expose for sale or exchange any unclean, impure, unhealthy, adulterated or unwholesome milk." It was proved that one Vandenburg, on August 25, 1885, purchased at defendant's store one pint of milk which was shown, by a chemical analysis, to have contained 89.04 per cent of fluids and 7.78 per cent of milk solids, and so, falling below the standard fixed by the act, came within its definition of adulterated milk. There was no dispute about these facts, but the contention of the defendant is, that he was not allowed to show an absence of criminal intent, or go to the jury upon the question whether it existed, but was condemned under a charge which made his intent totally immaterial, and his guilt consist in having sold the adulterated article whether he knew it or not, and however carefully he had sought to keep on hand and sell the genuine article. As

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the law stands, knowledge or intention forms no element of the offense. The act alone, irrespective of its motive, constitutes the crime. That conclusion was necessarily involved in our decision of *People v. Cipperly* (101 N. Y. 634; 37 Hun, 323). On the trial of that case the question was directly presented. While the principal defense was the invalidity of the statute upon constitutional grounds, and that branch of the contest dwarfed all others in the discussion, it was, nevertheless, true that the defendant, by offers of evidence and exceptions to rulings and to the charge, insisted that there could be no conviction without proof of a criminal intent, and that he should be permitted to establish an innocent purpose. The point was presented at General Term. If well taken, it was ground for a reversal, but while that tribunal disagreed upon the constitutional question, it indicated no doubt about the other. The majority, who thought the law invalid, construed it as requiring a conviction upon proof of the sale of milk below the standard "right or wrong" and said expressly that "the testimony that tended to show that he was careful, honest and innocent in this transaction, ought to have been considered, and if believed ought to have resulted in his acquittal; but under this statute such evidence can have no weight." The justice who dissented held that the law was constitutional and the conviction should be affirmed; a conclusion which he could not have reached if the question of intent had been erroneously excluded. That dissenting opinion we adopted on the appeal to this court and, reversing the General Term, affirmed the conviction. The wisdom or prudence of the law is not here in question. If there was any reasonable ground to doubt its meaning in the face of its plain language, that doubt was largely founded upon a possible inference from the terms of section 14 of the act of 1884 (Chap. 202), which made the prohibited omissions or commissions "presumptive evidence of a wilful intent" to violate the different provisions. It was argued that if intent was immaterial the presumption raised was needless. But in the amendment of 1885 that

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provision was omitted, and section 17 (Chap. 458) enacted that the simple omission of things directed, or commission of things prohibited, should be evidence of the violation of the act, and was in force when the defendant made the sale for which he was convicted. There remains no reasonable doubt of the legislative meaning and the constitutional power to so enact we have distinctly affirmed. The prudence of its exercise may be debatable but is not indefensible. It is notorious that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells and compels him to know and to be certain. We see no reason to change our ruling either as to the construction of the act or its constitutionality.

An exception was taken to the charge of the court construing the provision of the statute relating to "skimmed milk." We do not think that question was in the case. The proof on the part of the prosecution was of the sale of one pint of milk which was below the lawful standard. That made a *prima facie* case. Why the milk was below the standard, or by what means the result had been accomplished the prosecution were not bound to prove. If the effect came from skimming the milk, and the sale was within the exception of the statute, that was matter of defense, and especially for the reason that the fact, if it existed, was one peculiarly within the knowledge of the defendant, and which he could readily prove by his own testimony. But he gave no such evidence, and nothing in the proof raised the question in the

Statement of case.

case. The ruling, therefore, was immaterial and the defendant not entitled to the charge which he asked.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

FREDERICK E. WILCOX Respondent, v. JAMES CAMPBELL,
Appellant.

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137 230

Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgage debt, and the remainder is liable as security merely.

The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt.

This obligation on the part of the purchaser is not affected by its conveyance; and, if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused to him.

The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and, if he fails so to do and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages.

The rule which requires a party exposed to injury or damage to make the loss as small as he reasonably can, does not require the grantee of the remainder to advance the money to pay the mortgage for the purpose of protecting himself and his land.

(Argued June 10, 1887; decided July 1, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 35 Hun, 254.)

The nature of the action and the material facts are stated in the opinion.

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J. A. Stull for appellant. Plaintiff having only a quit claim deed of the property without warranty cannot recover on defendant's promise to his grantee. (*Garnsey v. Rogers*, 47 N. Y. 236; *Vrooman v. Turner*, 69 id. 283; *Miller v. Winchell*, 70 id. 437, 439; *Colyar v. Mulgrave*, 2 Keen, 81; 5 L. J. [N. S.], 535.) The contract or covenant of the defendant in question was with his grantee, Mrs. Wilcox. It enured to the benefit of her creditors, the mortgagees as well, the legal effect of the transaction as between the defendant and his grantor being to henceforth make the defendant the principal obligor, as to indebtedness assumed, and Mrs. Wilcox his surety. (*Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 id. 395; *Johnson v. Zink*, 51 N. Y. 336.) That relation would not result in behalf of the mortgagee creditors except for the fact that the creditors had the personal bond or obligation of the mortgagor and grantor, Mrs. Wilcox, as well as her mortgage on the premises conveyed. (*King v. Whitely*, 10 Paige, 465; *Vrooman v. Turner*, 69 N. Y. 283; *Bennett v. Bates*, 94 id. 370; *Carter v. Holahan*, 92 id. 504; *Trotter v. Hughes*, 12 id. 74; *Garnsey v. Rogers*, 47 id. 233; *Pardee v. Treat*, 82 id. 385; *Burr v. Beers*, 24 id. 178; *Cromwell v. Currier*, 27 N. J. 152; *Master v. Hansard*, 4 L. R. [Ch. Div.], 718; 36 L. T. [N. S.], 535; 46 L. J. [Ch.], 505.) The mortgagees might sue defendant in an action at law, and recover judgment for the entire amount of their debts respectively. (*Burr v. Beers*, 24 N. Y. 179.) They might, under the power of sale, foreclose the mortgages and sell his parcel of the mortgaged premises separately, and then enter judgment against defendant for the deficiency. (*Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 id. 595.) The obligation of defendant cannot be extended beyond his agreement. (*Strohauer v. Voltz*, 42 Mich. R. 448.) Whatever rights plaintiff or his assignor or his assignor's grantor had were founded in equity, and should have been pursued in a court of equity and according to equitable methods, by which course the rights of all parties could have been properly protected.

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(*Arnold v. Angell*, 62 N. Y. 508; *Bradley v. Aldrich*, 40 id. 504; *Mann v. Fairchild*, 2 Keyes, 106; *Hamilton v. McPherson*, 28 N. Y. 76, 77.)

Mr. Quincy for respondent. Defendant's covenant to pay off the mortgages was one which ran with the land. (*Torrey v. Bk. of Orleans*, 9 Paige, 649; 7 Hill, 260; *Russell v. Pistor*, 7 N. Y. 171; Brandt on Suretyship, §§ 21, 181; Thomas on Mort. 94; *Bk. of Albion v. Burns*, 46 N. Y. 170; *Lord v. Staples*, 23 N. H. 448; *Bonney v. Seeley*, 2 Wend. 481.) In so far as Bingham, or his property, was compelled to satisfy the mortgage indebtedness which Campbell should have paid, Bingham became entitled to be subrogated to the rights of the mortgage creditors. (Thomas on Mort. 94; *Eddy v. Traver*, 6 Paige, 521; *Cheesebrough v. Millard*, 1 Johns. Ch. 412; Brandt on Suretyship, §§ 21, 181; *Lord v. Staples*, 23 N. H. 448; *Bonney v. Seeley*, 2 Wend. 481; *Barnes v. Mott*, 64 N. Y. 397; *Russell v. Pistor*, id. 174; *Wells v. Porter*, 7 Wend. 119.) No assignment from the mortgage creditors was necessary in order to effect such subrogation and give Bingham a right of action. Brandt. on Suretyship, §§ 270-276; *Eddy v. Traver*, 6 Paige, 521; *Richter v. Cummings*, 60 Penn. St. 441; *Fanning v. Beaver*, 2 Rawle, 128; *Dempsey v. Bush*, 18 O. St. 376; *Elgerly v. Emerson*, 23 N. H. 555.)

EARL, J. Prior to the 9th day of November, 1874, Barton J. Conklin owned a parcel of land in the city of Rochester, being 187 feet front on North St. Paul street and 420 feet deep; and he had executed a mortgage thereon to a savings bank to secure the payment of \$3,000 and interest. On that day he conveyed the land to Jane E. Wilcox, subject to the mortgage to the savings bank, which she assumed and agreed to pay, and at the same time she executed to Conklin a mortgage for \$2,000 upon the land to secure a part of the purchase-price. On the 12th day of February, 1877, Mrs. Wilcox executed to the defendant a deed of the northerly 107 feet of

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the land, she retaining the remaining eighty feet thereof. The deed was subject to the two mortgages which the defendant assumed and agreed to pay as part of the purchase-price. On the 26th day of August, 1878, Mrs. Wilcox by a quit-claim deed, making no mention of the mortgages and expressing a consideration of \$1, conveyed the eighty feet of the land so retained by her to Lucius C. Bingham. Some time in 1878, the savings bank commenced a foreclosure of its mortgage for \$3,000 upon the entire parcel of land, and on February 12, 1879, the foreclosure proceedings resulted in the sale of the whole parcel of land, including the eighty feet deeded to Bingham and the 107 feet deeded to the defendant, and the proceeds of the sale were all used to satisfy the mortgages. Thereafter Bingham, by a written instrument, for a valuable consideration, assigned to the plaintiff all his claim for damages and all his causes of action against the defendant by reason of his failure to pay the mortgages. This action was subsequently commenced by the plaintiff to recover damages against the defendant because his assignor's land was sold in consequence of the failure of the defendant to keep his covenant to pay the mortgages; and upon the trial judgment was given for the plaintiff which has been affirmed by the General Term.

After the conveyance by Mrs. Wilcox to the defendant, he became the principal debtor to the mortgagees and she remained simply surety for him, and every one having notice of the relation between them was bound to respect it. The parcel of land conveyed to the defendant was primarily liable for the payment of the two mortgages, and the parcel of eighty feet was secondarily liable and simply remained security for the payment of the defendant's obligations. (*Wadsworth v. Lyon*, 93 N. Y. 201.) He, as principal debtor, was bound to protect both her and her land from any liability on account of his debts. After her conveyance of the parcel of land to Bingham, it was still simply security for the defendant's debts, and Bingham obtained the entire title thereto simply encumbered by a mortgage to secure obligations which the defend-

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ant was primarily liable to pay. The duty rested upon him, as principal debtor, to protect that land from sale, and when it was sold in consequence of his default, and its value applied in discharge of his obligations, he became liable to Bingham for the damages thus caused to him. That cause of action, by assignment, became vested in the plaintiff, and it does not depend upon any principle of subrogation. It was a direct liability to Bingham growing out of the defendant's default, and of a breach of duty which he owed. Bingham was brought into relations with the defendant by the conveyance to him and the ownership by him of the land bound as surety for the defendant.

Bingham, if aware of the foreclosure action, could have appeared therein and procured a sale of that portion of the land which was conveyed to the defendant first in discharge of the mortgages; and if that portion did not sell for enough, then he could have paid the balance due upon the mortgages to save his land; and the sum thus paid would have been the measure of his damages. Instead of paying such balance, he could have permitted his land to be sold, and certainly to the extent of its proceeds applied in discharge of the foreclosure judgment, he would have had a claim against the defendant.

But, under the circumstances of this case, both mortgages being liens upon the land, Bingham was not under any obligation to the defendant to take any steps in the foreclosure action; and if, by the default of the defendant, he was deprived of his land, the value of the land is the fair measure of his claim against the defendant. He must have been a party to the foreclosure action, and it was his duty to appear therein to protect his own interests as well as those of his surety.

The rule which requires a party exposed to injury or damage to make his loss as small as he reasonably can, did not impose upon Bingham the obligation to raise \$5,000 for the payment of the two mortgages for the purpose of protecting himself and his land from the consequences of the defendant's default.

It does not appear whether these two parcels of land were

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sold in a body as described in the two mortgages, or whether they were sold separately, and that portion conveyed to the defendant sold first. Nor does it appear how much the parcel of land conveyed to Bingham brought upon the sale. No question was made upon the trial about the rule of damages, and, therefore, if an improper rule was adopted by the court, which is denied, it is not a subject of review here.

Upon the whole case we see no reason to doubt that the judgment is free from error and that it should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. THE ROME, WATERTOWN AND OGDENSBURGH RAILROAD COMPANY, Appellant, v. SETH JONES et al., as Assessors, etc., Respondents

Where the assessors' oath, sworn to and attached to an assessment-roll, after the passage of the act of 1885 prescribing the form of such oath (Chap. 207, Laws of 1885), instead of following that form was drawn in conformity to the statute in existence when that act was passed, and the roll so verified was delivered to the supervisor of the town, but before it had been in any way produced before or acted upon by the board of supervisors a new oath in proper form was attached to the roll. *Held*, that the verification was valid; that in this respect and to this extent the provision of the statute as to the time of verification is directory only.

(Argued June 22, 1887; decided July 1, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made on the 1st Tuesday of January, 1887, which affirmed an order of Special Term in proceedings by *certiorari* to review the action of the assessors of the town of Kendall in assessing the property of the relator in that town for the year 1885.

The Special Term order denied the prayer of the petitioner and dismissed the petition and writs. The only objection

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insisted upon here was that the oath of the assessors was defective. It appeared that the oath annexed to the assessment-roll, when it was delivered to the supervisor of said town, instead of being in compliance with the requirements of the act (Chap. 201, Laws of 1885), was in the form prescribed by the law as it existed before the passage of that act. Subsequently, however, on October 17, 1885, and before the roll had been presented before or in any way acted upon by the board of supervisors of the county, another oath was taken by the assessors and annexed to the roll, which complied with the act of 1885.

William B. Hornblower for appellant. The oath of the assessors attached to the roll is a jurisdictional matter and the statutory requirements must be substantially complied with or the assessment is void, and all acts done in pursuance thereof are unlawful. (*Van Rensselaer v. Witbeck*, 7 N. Y. 217; 7 Barb. 133 [reversed]; *Westfall v. Preston*, 49 N. Y. 349; 3 Lans. 151; *Bellinger v. Gray*, 51 N. Y. 610; *Nat. Bk. of Chemung v. City of Elmira*, 53 id. 49; 6 Lans. 116; *Beach v. Hayes*, 58 How. Pr. 17; *Hinckley v. Cooper*, 22 Hun, 253; *People v. Suffern*, 68 N. Y. 321; *Brevoort v. Brooklyn*, 89 id. 128; *Inman v. Coleman*, 37 Hun, 170.) The departure from the statutory form of oath in these cases is a *substantial* departure within the meaning of the decisions and renders the assessment void. (*Inman v. Coleman*, 37 Hun, 170; *Hinckley v. Cooper*, 22 id., 253; *Beach v. Hayes*, 58 How. Pr. 17; *Van Rensselaer v. Witbeck*, 7 N. Y. 522; *Schettler v. Fort Howell*, 43 Wis. 48; *Goff v. Supervisors*, id. 55; *Westfall v. Preston*, 49 N. Y. 349; *Bellinger v. Gray*, 51 id. 620; *Nat. Bk. of Chemung v. Elmira*, 53 id. 49; *Bradley v. Ward*, 58 id. 406; *Brevoort v. Brooklyn*, 89 id. 128, 132.) The provision of the act of 1851, with regard to the mode of assessment, is impliedly repealed by the act of 1885, the acts being inconsistent. (Sedg. on Stat. Construction [2d ed.], 100, 104; *Dean of Ely v. Bliss*, 5 Beav. 574; *D. & L. Plk. R. Co. v. Allen*, 16 Barb. 17, 18;

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Commonwealth v. Comrs. of Allegheny, 40 Penn. St. 348; *Burdick v. Phillips*, 17 N. Y. Weekly Dig. 440.) The indorsing on the roll, or annexing to the roll, of a second oath to conform to the statute of 1885, does not avail to correct the jurisdictional defect theretofore existing. (*Westfall v. Preston*, 49 N. Y. 349; *People v. Suffern*, 68 id. 321; *People ex rel. Marsh v. Delaney*, 49 id. 655; *Clark v. Norton*, id. 243; *Mygatt v. Washburn*, 15 id. 316; *T. Man'fg Co. v. Lathrop*, 7 Conn. 530; *Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 id. 218; *Brown v. Hogle*, 30 id. 119; *People v. Fredericks*, 48 Barb. 176; *People v. Reddy*, 43 id. 539; *People ex rel. Heiser v. B'd Ass'rs*. 16 Hun, 408; *People v. Sup'rs Queens Co.*, 82 N. Y. 275; *People v. Com'rs of Taxes*, 91 id. 593.) When the assessors have delivered to the supervisor their assessment-roll their duties as assessors are at an end, and they cannot, after that, do any act whatsoever as assessors, and cannot correct or amend their proceedings. (*Devlin v. Mayor, etc.*, 6 Daly, 488; *Prutt v. Stiles*, 17 How. Pr. 211; *Shearman v. Justice*, 22 id. 241; *Niles v. Price*, id. 473; *O'Donnell v. McIntyre*, 37 Hun, 615.)

John Cunneen for respondent. The provision of the statute that the oath of the assessors to the assessment-roll shall be taken before a specified date is directory, and the oath is lawful, although taken at a later day. (*People ex rel. R. W. & O. R. R. Co. v. Ass'rs, etc.*, 104 N. Y. 377; *R. W. & O. R. R. Co. v. Smith*, 39 Hun, 332; 101 N. Y. 681.)

Per Curiam. Without passing upon the validity of the first oath taken by the assessors herein, we are of the opinion that the verification of the roll by them after it had been delivered to the supervisor, and before it had been in any way produced by him before or acted upon by the board of supervisors, was a compliance with the statute, and in this respect and to this extent the provisions of the statute, as to the time of verification, are directory only.

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This is the only question argued, and the order appealed from should be affirmed, with costs.

All concur, except ANDREWS, J., not sitting.

Order affirmed.

JOHN W. ANDERSON, as Assignee, etc., Respondent v. CLEMENT
READ et al., Appellants.

The word "sold" in a contract of sale of chattels does not necessarily import an executed contract.

Where, by the terms of the contract, some material act remains to be done by the vendor before he can insist upon making delivery or can claim payment, such word is to be construed as meaning "contracted to sell," and the contract is merely an executory one.

So, also, where the contract contains no specification, identification, description or appropriation of the particular property, no title passes to the vendee; in order to pass the title the article, if not delivered, must be in some manner designated so that possession can be taken by the purchaser without any further act on the part of the vendor.

Defendants' firm entered into a contract with the firm of R. W. L. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading, by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer, he agreed to accept the goods purchased of defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order, drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last of December or early in January, 1882. R. & Co. gave their notes as agreed for the purchase-price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum De L. gave his own notes and the acceptances of third persons to R. & Co. in payment for the goods. R. & Co. soon after stopped payment and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid

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the purchase-price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods, *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co. under the contract, and inasmuch as against R. & Co., defendants had the right to refuse to deliver the goods without payment therefor, after that firm became insolvent, they had the same right as against De L. or his assignee.

Also *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that defendants were not estopped from showing the fact that no title passed, or from denying the legal right of plaintiff, as assignee of De L., to a delivery of goods of the same character and quality as described.

Also *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that the question was one of law for the trial court, and that a submission thereof to the jury was error.

Kimberly v. Patchin (19 N. Y. 830); *Briggs v. Sizer* (80 id. 647); *Knights v. Wiffen* (L. R., 5 Q. B. 660) distinguished.

(Argued January 24, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 21, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought by plaintiff, as assignee for the benefit of creditors of one P. M. De Leon, to recover damages for the non-delivery of the goods mentioned in the instrument set forth in the opinion, wherein, also, all the material facts are stated.

Algernon S. Sullivan for appellants. The contract entered into between Raisin & Co. and the defendants on the 7th day of December, 1881, was an executory contract of sale. (2 Kent [10th ed.], 641; Story on Sales, § 233; 4 Benj. on Sales, § 310, *n.* [Corbin's ed.]; Blackb. on Sales, 120; Chitty on Cont. [11th Am. ed.], 524, 525; 1 Benj. on Sales [Corbin's ed.],

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§ 462; *Kimberly v. Patchin*, 19 N. Y. 332; *Foote v. Marsh*, 51 id. 283; *Higgin v. D., L. & W. R. R. Co.*, 60 id. 558; *Cook v. Millard*, 65 id. 356; *Merch. Nat. B'k v. Bangs*, 102 Mass. 295; *McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y. 495, 497; *Andrews v. Durant*, 11 id. 35; *Kelly v. Upton*, 5 Duer, 336, 340; 3 id. 309; Benj. on Sales [Corbin's ed.], § 311; *Harff v. Hines*, 40 N. J. L. 585, 586; *Ormsby v. Machlin*, 20 Ohio St. 295; *May v. Hooglan*, 9 Bush [Ky.], 171.) For a refusal on the part of Read & Co. to deliver under this executory contract, Raisin & Co.'s only remedy would be an action at law to recover damages for breach of contract; but, in such an action, Raisin & Co. cannot recover without actual payment, they having become insolvent before time of delivery. (Story on Sales, § 452; Benj. on Sales [Corbin's ed.] § 1305; id. 897, n. 23.) Even if it were established that the plaintiff was the assignee of Raisin's contract, he must have taken the same, subject to all equities that might be invoked against Raisin & Co. (Willard's Eq. 462; *Bush v. Lathrop*, 22 N. Y. 535; *Chitty on Cont.* [11th Am. ed.], 1366.) There was no direct privity of contract between defendants and De Leon. (*Simonson v. Brown*, 68 N. Y. 355; *Austin v. Seligman*, Daily Reg. Nov., 1883; *Rogers v. Union Stone Co.*, 130 Mass. 583; *Lawrence v. Fox*, 20 N. Y. 268; *Garnsey v. Rogers*, 47 id. 233; *R. E. T. Co. v. Balch*, 45 id. 532; *Pardee v. Treat*, 82 id. 392.) Even if the sale were an executed one, Read & Co., as unpaid vendors, would have a lien upon the goods for the price. (Story on Sales, § 281; *Milliken v. Warren*, 57 Me. 46; 5 Denio, 630; *Grice v. Richardson*, L. R. 3 App. Cas. 319; *Arnold v. Delano*, 4 Cush. 33; *Pardee v. Kanady*, 100 N. Y. 121; *N. E. I. Co. v. Gilb. E. R. R. Co.*, 91 id. 153; Benj. on Sales [3d Am. Ed.], § 759; Add. on Cont. [Am. Ed.], § 471; *Freeth v. Burr*, L. R. 96 C. P. 208; *Bloomer v. Bernstein*, id. 588.) By the delivery of the "order" and "memorandum" mentioned in the complaint, the property in the goods did not pass to De Leon and Read & Co.'s lien, as unpaid vendors, was not divested thereby. These papers are not *indicia* or documents

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of title; they are not *quasi* negotiable. (*Collins v. Ralli*, 20 Hun, 252; *Hentz v. Miller*, 94 N. Y. 64; *Ackerman v. Humphrey*, 7 M. & G. 678; *McEwan v. Smith*, 2 H. L. C. 309; *Farmeloe v. Bain*, 1 C. P. Div. 445; *Farina v. Home*, 16 M. & W. 119; Story on Sales, §§ 289, 344; *Imp. Bk. v. L. & St. Kitts D. Co.*, 5 Ch. Div. 200; Benj. on Sales [Corb. ed.], §§ 1212, 1214; Benj. on Sales, § 1225; Dan. on Neg. Instr., § 1713; *Lickbarrow v. Mason*, 2 Term R. 63; *Rogers v. U. Stone Co.*, 130 Mass. 583; *Gushee v. Eddy*, 11 Gray, 502; *Sears v. Lawrence*, 15 id. 267.) The doctrine of estoppel cannot be invoked against the defendants. (Bigelow on Estop. [2d ed.] 437, 438; *White v. Ashton*, 51 N. Y. 280; *Musgrave v. Sherwood*, 54 How. Pr. 339; 6 Wait's Action & D., 684; *Farmeloe v. Bain*, 1 C. P. Div. 445; *McEwan v. Smith*, 2 H. L. C. 309; *Rogers v. U. Stone Co.*, 130 Mass. 581; *Gunn v. Bolkow*, 10 Ch. 491; Benj. on Sales [Corb. ed.], §§ 1153, 1212; *Woodley v. Coventry*, 2 H. & C. 164; *Knights v. Whiffin*, L. R. 5 Q. B. 660; *Pearson v. Dawson*, El. B. & E. 447; *Briggs v. Sizer*, 30 N. Y. 650; *Voorhees v. Olmstead*, 66 id. 113.) Raisin & Co. were guilty of fraud in making the original contract, and defendants were thereby entitled to avoid it. (*Cary v. Hotailing*, 1 Hill, 311; *De Graw v. Elmore*, 50 N. Y. 1.)

E. Louis Low for respondent. Read & Co.'s agreement with Raisin & Co. was an executed contract. (*B'k of Rochester v. Jones*, 4 N. Y. 503; 2 Starkie on Ev., pt. 2, p. 1221; *Dox v. Day*, 3 Wend. 357.) When third parties, who, like De Leon, may have been deceived, to their detriment, by the expression "sold," through the fault of the seller, the latter should be estopped from claiming a different signification. (*Kelly v. Upton*, 5 Duer, 336; Benj. on Sales [Corb. Ed.], § 311.) The delivery order vested title in De Leon. (Benj. on Sales [4th Am. Ed., Bennet], § 814 *et seq.*; § 823; *McNeil v. Hill*, Woolworth C. C. R. 96; *Allen & Co. v. Maury & Co.*, 66 Ala. 18; *Chirardelli v. McDermott*, 22

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Cal. 539; *Davis v. Russell*, 52 id. 611; *How v. Barker*, 8 id. 613; *Wailes & Co. v. Couch*, 75 Ala. 134; *Merch. B'k of Detroit v. Hibbard*, 48 Mich. 118; *Briggs v. Sizer*, 30 N. Y. 647; Benj. on Sales, 934, § 817; Addison on Cont. 959, 486 [8th ed. Am. N. by Abbott]; *Hemmingway v. Poucher*, 98 N. Y. 281; *Pearson v. Dawson*, 27 L. J. Q. B. 248; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Voorhis v. Olmstead*, 66 N. Y. 113; *Woodley v. Coventry*, L. J., 1863, Causes at Common Law, 32 N. S. pt. 2, p. 185; *S. C.*, 2 H. & C. 164; *Hunn v. Bowne*, 2 Caine, 38.) Defendants are estopped. (*Knights v. Wiffen*, L. R. 5 Q. B. 660; *Woodley v. Coventry*, 32 N. S. L. J., 1863, Causes at Common Law; *Hunn v. Bowne*, 2 Caine, 38; *Heuertematte v. Morris*, 101 N. Y. 70; *Victor v. In. Nav. Co.*, 13 J. & S. 142; *Cont. Nat. B'k v. Nat. B'k of Comm.*, 50 N. Y. 575; Bigelow on Est. [4th ed. 1886], 553; *Pearson v. Dawson*, 27 L. R. Q. B. 248; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Woodley v. Coventry*, L. R., 1863, etc., 185; *Hunn v. Bowne*, 2 Caine, 38; *McNeil v. Hill*, Woolworth's C. C. 96.) When the seller undertakes to sell and deliver goods he cannot defend by showing outside of his contract that the goods were not actually segregated or set aside, and the title passes to the vendee without such segregation. (*Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 id. 118; *Merch. B'k of Detroit v. Hibbard*, 48 Mich. 118; *Woodley v. Coventry*, 2 H. & C. 164; *Knights v. Wiffen*, L. R. 5 Q. B. 660.)

PECKHAM, J. Prior to and at the time of the transactions in question in this action, the firm of Rasin & Co. was engaged in business in the city of Baltimore as manufacturers and sellers of fertilizers, and the defendants as partners, and one Perry M. De Leon, individually, were engaged in the same business in the city of New York. On or about the 7th day of December, 1881, one of the members of the defendants' firm and an agent or member of the firm of Rasin & Co., met in the city of Atlanta, in the State of Georgia, and signed a contract, of which what follows is a copy :

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"MARKHAM HOUSE,

"W. A. HUFF, *Proprietor.* }

"ATLANTA, Ga., *December 7, 1881.*

"We have to-day sold to Messrs. R. W. L. Rasin & Co., of Baltimore, Md., one thousand tons ammoniated superphosphates, at twenty-four (\$24) dollars per ton (2,000 lbs.), on a cash basis, goods to be delivered free on board buyers' vessels, and by us in bulk. We guarantee the analysis of the goods to be not less than two per cent of ammonia, and not less than eight per cent of available phosphoric acid; sampling and analysis of each shipment to be made by A. R. D. Dane & Co., of New York, or by Prof. White, of Georgia. Settlements are to be made on delivery to buyers of bills of lading by their notes, with six per cent interest added. For the convenience of sellers, buyers agree to make their notes at four months, with the understanding that they are to be renewed so as to mature finally not later than December 10 and December 20, 1882, say one-half each date. Shipment to be made as early as possible during this month.

"READ & CO., of *New York.*"

"We accept the above.

"R. W. L. RASIN & CO., *Baltimore, Md.*"

"Messrs. Read & Co. have the option of furnishing an additional one thousand tons on above terms, within twenty days from this date."

This contract, or a duplicate, was received by the respective firms, through the mail, by the ninth of December following its execution in Atlanta.

After the execution of the contract, one of the members of the firm of Rasin & Co. came to New York. He had heard of its execution through a telegram, but the contract had not arrived by mail before he left. On Friday, December ninth, he went to see De Leon in New York. His firm had, in the previous September, contracted to deliver to De Leon two thousand tons of this same general kind of fertilizer

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deliverable in November and December, 1881, and January, 1882, and they had delivered but three hundred tons, and were unable to deliver more, owing, as Rasin said, to the burning of his factory, but probably because of the pecuniary condition of the firm. At his interview with De Leon on the ninth, he says that he then offered to make a delivery to De Leon on their contract by delivering to him the one thousand tons which he was to obtain from the defendants under his contract with them; that De Leon objected, but finally consented on his promising to substitute, if possible, before the actual delivery of the goods, those which were of his (Rasin's) own manufacture. Rasin was to give an order on defendants, which was to be accepted by them.

The next day Rasin called on defendants and had an interview with one of the firm at their office. Rasin testified that he asked Read if he knew of the contract made at Atlanta for the 1,000 tons; he said he did. He was then asked if he knew why they (Rasin & Co.) had made that purchase; he said yes, he understood Rasin & Co. were in a hole and that they had purchased the 1,000 tons to get out. Rasin said that was a fact; that De Leon was pressing them for a delivery of goods to him at once, and he, Rasin, was ready to comply with his agreement with them (defendants); that they should have the notes drawn up to suit themselves, such time as would best suit their convenience to have them discounted. Read said it was all satisfactory, and he had the notes drawn. Rasin also said to Read that as these goods were purchased to relieve them to some extent on their outstanding contract, and, as he proposed to deliver those goods to De Leon, he would request Read's firm to accept an order in favor of De Leon to that effect; and, as there had been more or less trouble about the delivery and shipment of goods, which, in this case, he wished to avoid, he also requested Read & Co. to give him a memorandum of the time it would be convenient for them to deliver him these goods, that he might take it to De Leon. Rasin then produced a paper as follows: .

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"BALTIMORE, *December 9, 1881.*

"MESS. READ & CO., 34 *Beaver street, N. Y.*

"GENTLEMEN.—Please deliver to P. M. De Leon one thousand tons of ammoniated superphosphates sold to us, and oblige,

"Very respectfully,

"R. W. L. RASIN & CO."

"Accepted.

"READ & CO."

This whole paper is in the handwriting of Rasin, with the exception of the signature "Read & Co." which is written after the word "Accepted" and across the face of the order.

After Read & Co. had signed this order, and upon the request, as above stated of Rasin, the following memorandum was signed by Read & Co:

"Memorandum.

"To MESSRS. R. W. L. RASIN & Co., *Baltimore, Md.*

"From READ & Co.,

"34 *Beaver street, New York, December 10, 1881.*

"DEAR SIR.—We will deliver to Mr. P. M. De Leon on your order, dated Dec. 7th, accepted by us to-day, one cargo, say 500 tons to vessel, to begin loading about the 19th December, and the remainder of the 1,000 tons to a vessel to load the latter part of December or early in January, 1882, vessels to be furnished by Mr. De Leon.

"READ & CO."

The date of December seventh in above memorandum refers to the order of Rasin & Co. on defendants, and which is really dated December ninth as stated, though the figure in the original is said to look like a figure seven.

The account of this interview given by Mr. Read does not materially differ from Mr. Rasin's. Mr. Read said that Mr. Rasin called upon him at his office and told him he had sold more goods than he could deliver, and that he wanted this 1,000 tons to deliver to De Leon. Read said he saw no objection to his doing so and Rasin then pulled out of his pocket the order above set forth, handed it to Read and asked

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him to sign it. Read read it, and in the end signed it by writing the name of the firm across the face thereof as accepted. Read says Rasin said nothing about what was to be done with it. In response to a request from Rasin for a prompt delivery Read said he saw no reason why they should not deliver them early, that they had not got the goods made but they had the stock in the factory and it would take them but a few days to make up the goods. (On the trial Read testified that they had no such goods on hand when the Atlanta contract was executed.) Rasin then asked for the memorandum as to delivery, which Read then wrote out, signed and gave to him. He supposed that Rasin would give them (the order and memorandum) to De Leon if he did not change his mind. Read also says he accepted this order and signed the memorandum in order to carry out his contract with Rasin & Co. Rasin then took the order and memorandum to De Leon, who thereupon gave him his own notes for about \$12,000, and the acceptances of third parties for about the same amount in payment for the goods which he thus purchased from Rasin & Co. The acceptances were subsequently paid, but the notes given by De Leon were not.

On Monday, December twelfth, Rasin went back to Baltimore, and about the fifteenth of December, a clerk of De Leon called at Read's office, as he says, to learn where the boat should be sent when the goods were manufactured, to be delivered on this accepted order. Read & Co., in the meantime had learned some things which caused them to look with suspicion on the whole transaction, and the result was that they refused to deliver the goods, and notified De Leon of their determination and told him not to attempt to negotiate the order. The ground alleged was that the sale to Rasin & Co. was procured by fraud, and that De Leon was a party to it, and the order and writing on it was a part of the fraud. This notification was subsequently served on plaintiff, the assignee of De Leon, who made an assignment for the benefit of his creditors soon after this transaction. On Thursday, December fifteenth, Rasin & Co. stopped payment,

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and on the following day made an assignment for the benefit of their creditors.

The defendants refused to deliver the goods to the assignee of De Leon under the order above mentioned unless they were paid the purchase-price of the same, and offered to surrender the notes of Rasin & Co., which they had given pursuant to the terms of sale of the Atlanta contract, upon such payment.

The assignee of De Leon commenced this action against defendants, claiming to recover from them the value of the goods which the defendants had refused to deliver, with the costs of the action.

The answer of defendants denied any knowledge or information, etc., as to any of the transactions between Rasin & Co. and De Leon, and also set up fraud in the making of the original contract of sale on the part of Rasin & Co. in representations as to their pecuniary condition, etc., and alleged that they had received no consideration for the order accepted by them, and that they had never been paid for the goods; also that De Leon knew Rasin & Co. were insolvent when they made the Atlanta agreement, and that he was himself in an insolvent condition and knew the fact when this order was obtained, and that he failed within six days thereafter.

Upon the trial evidence was given upon the subjects above set forth. It was there much mooted as to the character of the Atlanta contract, whether it was an executed or an executory one; whether, in other words, title to 1,000 tons of fertilizer passed from defendants to Rasin & Co. by the execution of that contract.

The learned judge who tried the case charged the jury "that this is an executed contract of sale." He further said:

In the dealing between Rasin and De Leon this, I think, appears, to which I will call your attention. That De Leon said he would give the notes on condition of getting the delivery order signed by Read & Co. What did De Leon mean by that? If you find, gentlemen, any aid in the evidence to guide you to a conclusion on that subject, ascer-

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tain if you can whether De Leon expected that he would get the actual possession and delivery of these goods, or did he expect that he would receive a paper giving him the right to the delivery, subject to the vendor's lien? That question, gentlemen, is for you, and is one of the questions that specially lead up to the conclusion." Again: "If you believe, gentlemen, that Mr. Read thought when that paper was signed by him for the purpose of being delivered to Mr. De Leon that it would lead Mr. De Leon to the opinion that he was to have the ownership of these goods on the day mentioned in that paper, in the letter for the delivery of them, and that that possession was not to be interfered with by any claim on the part of Messrs. Read for their vendor's lien, why then, gentlemen, you will say so by your verdict. If you believe that that paper was meant to convey the effect on Mr. De Leon's mind that he was to have the possession of the articles in question free from the vendor's lien, and that Messrs. Read, in signing that paper, intended to convey that fact upon De Leon's mind, you will find a verdict for the plaintiff. If, on the other hand, you believe that Messrs. Read, in signing that paper, intended to reserve their vendor's lien, and had no intention whatever to convey any other idea to Mr. De Leon, then, gentlemen, you will find for the defense."

Exceptions were duly taken to the charge as above given. The court also charged that if entitled to anything the plaintiff was entitled to receive the full value of the property at the time it should have been delivered under the contract. The defendants also duly excepted to such charge. The jury returned a verdict of \$27,337.90 for the plaintiff upon which judgment was entered, which was affirmed at the General Term of the Superior Court, and from which judgment of affirmance the defendants have appealed here.

In the argument here the learned counsel for the plaintiff sought to maintain his right to recover upon two different and distinct propositions, the first being that the Atlanta contract was an executed one after payment had been made by the delivery of the notes of Rasin & Co. to the defendants

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and accepted by them, as (he claimed), nothing remained to be done but to deliver the goods of the quality and at the time agreed upon, and that the delivery order accepted by Read & Co., and transferred to De Leon by Rasin & Co. for a valuable consideration paid at the time by De Leon divested Read & Co. of the ownership in the goods and vested the right of property in De Leon, the same as if a regular bill of lading had been given by Read & Co. to Rasin & Co., and had been assigned by them to De Leon in good faith for value paid at the time of the assignment.

The second proposition is that whether the contract was an executed or simply an executory one, was immaterial, as the defendants are estopped from setting up any claim for a vendor's lien as against De Leon, by reason of the facts already stated herein.

I. As to the first ground of recovery. We are quite clear that the contract in question was executory, and in that respect we differ from the learned trial judge.

It is true that the contract uses the words "we have to-day sold to Messrs. R. W. L. Rasin," etc. But that language must be construed in connection with the rest of the contract, which must be taken as a whole, and such construction placed upon it as the language used in the entire instrument calls for. Looking at the contract in this light, it will be seen there are two facts which render it entirely clear that it is in its nature a purely executory one. One fact is, that there was to be an analysis of the super-phosphates by a New York or a Georgia chemist before delivery or payment, as provided for by the contract, could be insisted upon. Perhaps the vendee might, if he chose, waive the analysis and trust entirely to the guarantee and thus accept delivery without it. But the vendor could not compel an acceptance or claim payment without an analysis, and, therefore, no title passed upon the signing of the agreement. In this respect there is no material distinction between this case and *Russell v. Nicoll* (3 Wend. 112.) The language there used was "sold by Daniel Rapelye," etc.

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But because upon a perusal of the whole contract it was clear that the property sold was to arrive in New York before a certain date as a condition of the sale, the court said that such arrival must precede the change of title, and that the contract was executory; that the word *sold* used in the contract meant contracted to sell. It is the same here. The word used means the same — “contracted to sell,” because some material act had yet to be performed by the vendor before he could insist upon making delivery or claim payment for the goods, and that act was to make an analysis of each cargo or shipment which analysis must show the cargo to have reached a certain stipulated standard before his contract would be complied with.

The other fact is that there is in the contract no specification, identification or description of the particular property sold. It was simply 1,000 pounds of superphosphates. Where the goods were is in no way designated or intimated. They might have been in Europe, New York, Georgia, or (as was the truth), not *in esse*, and still every word of the contract have full significance. How is it possible to say that the title to any particular superphosphate passed to the vendee when there is no description or identification of it to be found in the contract, or any reference to it therein made? Suppose the vendors had had 1,000 tons of the goods in their factory in New York, and that after the signing of the contract, a fire had totally destroyed the factory and its contents, who would have had to sustain the loss of such goods? Is there the least ground for claiming that the vendees must suffer it? Make the same supposition, but place the goods at Atlanta, and the same question arises and the same answer must be given. As is said by COMSTOCK, J., in *Kimberly v. Patchin* (19 N. Y. 330, at 333): “It is not only legally but logically impossible to hold property in such things unless they are ascertained and distinguished from all other things, and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be *desig-*

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nated so that possession can be taken by the purchaser without any further act on the part of the seller." This was said in a case where the question arose as to the transfer of title to a quantity of grain, a part of a larger quantity in a warehouse, which was designated and identified, and this court held the title passed on the execution of the contract. But when a quantity of oil was sold out of a stock consisting of different large quantities in different cisterns, and at various warehouses, and the note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract, the court held the title did not pass (*White, Assignee v. Wilke*, 5 Taunt. 176), and that case is cited with approval in *Kimberly v. Patchin* (*supra*).

The contract being executory when entered into, did not become an executed one by the acts of the parties in New York when the defendants took the notes of Rasin & Co. as provided for in the contract. The most that could be plausibly argued therefrom is that Rasin & Co. waived their right to demand an analysis before giving their notes for the goods: but nothing then done cures in any way the difficulty in the contract in its failure to designate or identify the goods which were sold, and in regard to which it was claimed title had passed to Rasin & Co. This fatal defect in the contract, which precludes all possibility of claiming it to be an executed contract under which title passed to any specific or designated 1,000 tons of super-phosphate, attends it at all times and renders further discussion of its character, useless. The question is not whether Rasin & Co. supposed the goods were in existence, but whether from that contract the title to 1,000 tons of designated and identified phosphates passed to them. It did not pass, notwithstanding all their suppositions, unless there were some designation or identification of some certain 1,000 tons, even though out of a larger mass, and that there was no such designation or identification,

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the contract conclusively proves. It is clear, then, that the execution of this contract transferred no title to any particular goods to Rasin & Co., and that there was a mere agreement to sell and deliver in the future on the terms and conditions mentioned in the contract.

This so-called delivery order, signed by Rasin & Co. and addressed to the defendants, is not a bill of lading or a warehouse receipt, and has no properties in common with them. It requests defendants to deliver to De Leon 1,000 tons of ammoniated super-phosphate *sold to us*, and is signed by Rasin & Co. It identifies no goods, designates none, and does not state where they are deposited or with whom. It is simply a direction to the defendants, justifying them in delivering to De Leon 1,000 tons of the goods, and in calling such a delivery a delivery to Rasin & Co. It is no more than an assignment of the rights of Rasin & Co., under the contract to De Leon, who takes it and stands in the shoes of his assignors.

The acceptance of the order, which was signed by defendants, has no further effect (aside from the possible estoppel, of which I shall speak later), than to place defendants in a position where they might be compelled to deliver to De Leon, all other things being equal, unless Rasin & Co., in demanding a delivery to them, should produce the accepted order signed by the defendants. In other words, the effect of the transaction is to put De Leon in the place of Rasin & Co., with no other or greater rights in the matter than they had. The American authorities, cited by the learned counsel for the plaintiff as to the rights arising from the issuing or indorsement of bills of lading and warehouse receipts by custodians of the property, do not touch the case in hand.

It is said that the defendants, by the acceptance of the order, stood in the position of a warehouseman who has attorned, and their acceptance passed the property to De Leon. This assumes the whole question, and is, we think, wholly unwarranted. The nature of the transaction between Rasin & Co.

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and the defendants is completely lost sight of. The truth, it must be remembered, is that defendants have agreed to sell to Rasin & Co. certain goods, unidentified and undesignated (and in truth not in existence), deliverable at a future day after an analysis should disclose the fact that the goods fulfilled the terms of the contract. All that this order does is to direct this delivery to be made to De Leon in fulfillment of defendants' contract with Rasin & Co. ; and this the defendants by accepting the order agree to do. De Leon, therefore, takes a paper which is in no sense a warehouse receipt or bill of lading, but which simply asks that the goods sold Rasin & Co. shall be delivered by defendants to De Leon ; and where those goods are, and the terms of the contract, it behooves De Leon to know. After acceptance the defendants were no more their own warehousemen than before. They entered into no other or different relations with De Leon than they had with Rasin & Co., and their only obligation to the former was to deliver to him, as they would have delivered to Rasin & Co., the 1,000 tons of the described goods upon the contract terms. A delivery order merely, transfers no title to the goods mentioned in it.

Considerable stress was laid on the argument upon the case of *Briggs v. Sizer* (30 N. Y. 647). In that case the order upon the drawee was not accepted, and for that reason the court held there was no cause of action against him. The opinion of the learned judge seems to assume that if there had been an acceptance of the order the plaintiff would have been entitled to recover. There was no question made of the right of the drawee (the defendant) to retain the goods until payment by the vendee (on his becoming insolvent), or by the assignee of the vendee, because the court held there was no liability on the ground of a lack of acceptance.

Therefore, whether in case the acceptance had been proved the judgment of the court would have been the same, if the right of the defendant to retain the goods until payment had been asserted because of the insolvency of the vendee, is matter of mere conjecture. That question has not been

decided and the case is no authority against the view which a majority of the court now takes of the questions involved in this case.

We think, therefore, that upon the first ground discussed the plaintiff fails to make out a case for judgment in his favor. He has shown no title to the goods by virtue of the Atlanta contract and the alleged delivery order accepted by the defendants.

II. The other ground for the recovery is that the defendants are estopped from denying the legal right of the plaintiff to a delivery of goods of the same character and quality as described in the Atlanta contract, because of all the facts, the Atlanta contract, the so-called delivery order, the letter and the acts of the defendants and the change of position of De Leon in reliance on them.

The question is raised by the exception to the charge of the learned trial judge in which he submitted to the jury the matters quoted above. After a careful examination of the alleged delivery order, its acceptance and the letter written by one of the defendants, and in the light of the testimony of both parties as to what occurred at the meeting between Rasin and Read in New York on the tenth of December, we think there was nothing which authorized the submission of any such question to the jury. The most that can be extracted from a perusal of all, including the oral evidence given on the trial, is that Rasin had contracted to deliver to De Leon goods which he did not have, and could not get in sufficient quantity; that he told this to Read and said that he had purchased the 1,000 tons from him in order to deliver them to De Leon on his contract. This Read knew, and he supposed when he accepted the order and signed the statement as to when he would deliver on the contract, that Rasin would give it to De Leon, unless he thereafter changed his mind, which there is no evidence to show he could not legally and properly at any time have done. It is not pretended that defendants had any design to mislead De Leon in the slightest degree. Such design may not, perhaps, be necessary, but it

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does not exist here. There is not a word of evidence that Rasin said to defendants he intended to try and procure money or notes from De Leon on the faith of this order, nor was there any evidence but that this 1,000 tons, so far as defendants knew, were to be delivered in fulfillment of an obligation of Rasin to De Leon for the delivery of goods which had already been fully paid for. Indeed there was no evidence whatever of any further knowledge on the part of Read than that Rasin was under obligations to De Leon which he was endeavoring to partly fulfill by having defendants deliver to De Leon the 1,000 tons in fulfillment of defendants' contract with Rasin & Co. It is not pretended that Rasin said to Read he had been to see De Leon, and that he had finally consented to pay \$25,000 for this 1,000 tons, provided he got an accepted order with this written statement from defendants, or that it would be upon the faith of this order and acceptance that he would advance the \$25,000. This whole transaction, it must be remembered, is with Rasin. The order is drawn, signed and produced by him at the store, and the letter or statement signed by defendants is addressed to Rasin & Co., and is plainly a document showing a consent to deliver to De Leon in fulfillment of defendant's executory contract with Rasin & Co.

Nor is there anything in the form or contents of the order which prevents the defendants from withholding delivery. In the first place the order is not what is strictly and technically known as a delivery order. Such an instrument purports to order the delivery of goods then in existence and described, and in a known and designated place, so that possession could be at once taken thereof without further orders or permits from the owner. This is no such instrument. It describes no goods other than a mere statement of their kind, gives no designation as to where they are, or whether they are yet in existence. The word "sold" as has been already seen does not in and of itself necessarily imply either the existence of or the change of title in the goods. In other words, whether the contract changed the title to

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existing goods, or only agreed to sell goods thereafter, is not to be decided solely by reference to the word *sold* as found in the contract. Whether there has been this change of title depends upon the whole of the language used in the contract, and the circumstances of the transaction, and unless a party has done some act which estops him he may always show what those facts are in order to see whether the title has or has not changed. There is no act of defendants proved here which should estop them from showing the truth that no title had passed, and that the words "sold to us" as used in the accepted order meant the same as when used in the contract, viz., "contracted to be sold."

De Leon, therefore, took such an order at his peril, and received from defendants no representation, whatever, tending in any way to show that any title to any specific property had ever passed to Rasin & Co. He occupies, therefore, simply the position of Rasin & Co. in regard to the property. The right remains with the vendors to refuse delivery to the vendees on their becoming insolvent, unless they pay for the property on delivery. A tender of notes of the insolvent as payment of the property is no payment within the meaning of this rule, even though agreed to be so received in the contract. By the insolvency which happens subsequent to the making of the contract, the right to refuse delivery springs up unless payment in cash is made.

All that is seen by the accepted order, therefore, is that the defendants acknowledged that they have sold (which expression may mean simply contracted to sell), certain goods mentioned therein to Rasin & Co., which they agree, with Rasin & Co., to deliver to De Leon. If the latter desired accurate information from the vendors in order to bind them as to the meaning in this instance of language which is susceptible of different meanings, he should have asked them, and if the defendants then made any false representations, or were guilty of acts which were equivalent thereto, they might thereafter be estopped from showing the truth as against one who, on the faith of such representations or acts, had altered his posi-

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tion to his detriment if the truth should be proved. Here is no such case. When the order is produced by Rasin and accepted by defendants, the implication which accompanies it on these facts, is that defendants will deliver to De Leon under the same circumstances which they would deliver to Rasin & Co., and if circumstances should arise prior to the delivery which would absolve the defendants from their obligation to deliver to Rasin & Co., by reason of their insolvency, the same right would remain with defendants when a delivery should be demanded by De Leon.

The written statement is but an amplification of the order and its acceptance, and creates no other or greater rights in De Leon than he would have had under the order alone. It makes the time of delivery a little later than the original Atlanta contract, but no new obligation is thereby entered into by defendants.

To give the jury, upon the evidence in this case, the right to say what the intentions of the defendants were as to a waiver of their right to refuse delivery on the insolvency of their vendee until payment should be made, is to submit a question of law to that body, and is, therefore, error.

What we say is that there is no evidence in the case authorizing the submission of this question of intent on the part of the defendants. Taking it altogether, the evidence shows that it is simply a promise on the part of defendants, made to Rasin & Co., to deliver goods (unidentified and undesignated) to De Leon, which they had contracted to sell to Rasin & Co., and such delivery was to be in fulfillment of such contract, with the same right to refuse delivery to De Leon which they would have had to refuse it on demand of Rasin & Co.

This case is quite as strong for the defendant as that of *Farmeloe v. Bain* (1 C. P. Div. 445). In that case defendants sold 100 tons of zinc to B. & Co., and gave them an order, in which defendants undertook to deliver to their order, indorsed thereon, twenty-five tons, etc., "*off your contract of this date,*" and signed it. Upon the faith of this docu-

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ment the plaintiffs bought of B. & Co. and paid for fifty tons of zinc, and B. & Co. having failed without having paid the defendants, they refused to deliver the zinc to the plaintiffs. The jury found that the defendants, in signing the order, intended the same as a representation to all persons to whom it should be shown that the goods therein mentioned were the property of B. & Co. The court, however, held that this document, thus signed by defendants, was not a known document among merchants and was to be looked at as any other instrument in writing, and as thus looked at it contained no representation of any fact, and the plaintiffs had no right to rely upon it as such a representation, and consequently could not claim an estoppel.

In the documents before the court in this case, there are no representations of any fact which the defendants now seek to deny. They simply claim the right to refuse to deliver to an insolvent vendee, or his assignee, goods which they had contracted to sell and deliver to one whom they supposed solvent when the contract was made. They deny no fact stated in their writings, and they take no new or different position and claim no other or further right than they have at all times had.

The case of *Knights v. Wiffen* (L. R. 5 Q. B. 660) is in no respect adverse to these views. It was decided in 1870, and the case of *Farmeloe v. Bain* (*supra*) in 1876. If the latter case were antagonistic in any way to the earlier it would at least have been mentioned. This later one is much more like the case at bar than is that of *Knights v. Wiffen*. There is, however, a clear distinction between *Knights v. Wiffen* and the case under discussion. In that case the defendant had a quantity of barley in sacks lying in his granary, which adjoined a railway station, and he sold eighty quarters of it to M. No particular sacks were appropriated to M., though the barley remained at the granary subject to the orders of M., but in the possession of defendant, who was an unpaid vendor. M. afterwards sold sixty sacks to the plaintiff Knights, who paid him therefor. M. gave plaintiff

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a delivery order on the station master, as agent of defendant, to deliver to plaintiff the sixty sacks, and the defendant accepted it and said "all right," etc. It was held that defendant was estopped from denying that upon the receipt of the order he had appropriated out of the greater bulk the sixty sacks in question, and that so the title had passed to the plaintiff, who was entitled to its possession; that the other party had altered or changed his position by virtue of defendant's acceptance of this delivery order, and the acceptance substantially acknowledged that defendant had made such appropriation, and consequently he must be treated as if he had, in which case the title and right to the possession of the barley would have passed to the plaintiff. These facts stand out in that case. The property was *in esse*, known and described, being a part of a larger quantity in the actual possession of the defendant. The delivery order for a part of the barley is shown him and he accepts it. He thereby, in effect, acknowledges that he has the barley in his possession; that an appropriation has been made of the proper amount and placed in the possession or under the control of the purchaser, and that acknowledgment is the statement of an existing fact which the plaintiff relied on and acted accordingly. No such case exists here. This is an executory contract between defendants and Rasin & Co., by which defendants are to deliver, at a future time, property of a certain kind, neither designated, identified or appropriated, and as matter of fact not then in existence. The vendees ask defendants to deliver to De Leon the property sold to them, and the defendants accept the order and state in writing when they will be able to deliver. Here is no transfer of the title to any property to De Leon, nor is there any representation by act or speech of the existence of any fact from which such inference might be drawn by a reasonable man.

The other English and American cases, cited by plaintiffs' counsel upon the question of estoppel, were decided upon the same principle as *Knights v. Wiffen* (*supra*). In that case, as well as in the other cases, it must be always borne in mind

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that the title and the right to the possession of certain specific property (which was *in esse*, described and its whereabouts known and stated) would have passed to the claimant if the things had actually been done by the warehousemen, wharfingers, etc., which by their acts the court held they acknowledged that they had done, and upon the faith of which acknowledgment and representations the claimants had acted. Under such circumstances the courts decided that these same warehousemen, wharfingers, etc., could not turn around and, after the claimant had altered his position on the faith of their acts and representations showing that title had actually passed to him, undertake to deny the same and claim the property.

The claim of plaintiffs' counsel that many of the American cases hold the doctrine that delivery orders transfer the title to the property the same as a bill of lading, even without acceptance, is not material here. No delivery order, nor any other document, can transfer the title to property not in existence or unidentified and undistinguishable from a larger mass, not itself designated and from which no appropriation has been made.

We are thus, in this case, brought back to the one material question of estoppel, and upon that we think the counsel for the plaintiff necessarily fails. He does not claim to be able to maintain his recovery on the principles applied in *Lawrence v. Fox* (20 N. Y. 268), and other like cases. In this we think he is correct.

After carefully examining the facts in this case in all their bearings, as presented by this record, we think no title passed to any goods by virtue of the papers mentioned herein, and that there was no estoppel, and that the only effect of the transaction proved was to substitute De Leon for Rasin & Co., subject to defendants' right to refuse delivery to either on the insolvency of the vendees, Rasin & Co.

The judgment should, therefore, be reversed and a new trial ordered, costs to abide event.

DANFORTH, J., (dissenting). The plaintiff sues as assignee of one P. M. De Leon, for the benefit of creditors, and seeks

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to recover from the defendants damages for the non-delivery by them of 1,000 tons of super-phosphates mentioned in the following instruments, viz., an order in these words:

"BALTIMORE, *December 7, 1881.*"

"Messrs. READ & Co., 34 *Beaver street, N. Y.*

"GENTLEMEN.—Please deliver to P. M. De Leon one thousand tons of ammoniated super-phosphates sold to us, and oblige,

"Very respectfully,

"R. W. L. RASIN & CO.,"

which was drawn by Rasin & Co., and accepted by the defendants under the name of Read & Co., by writing across the face of the paper "accepted," and signing the same by their firm name, and so accepted was delivered to Rasin & Co. with the following memorandum:

"To Messrs. R. W. L. RASIN & Co., *Baltimore, Md.*

"From READ & Co.,

"34 *Beaver street, New York, December 10, 1881.*

"DEAR SIRS.—We will deliver to Mr. Perry M. De Leon on your order dated Dec. 7th, accepted by us to-day, one cargo, say 500 tons to vessel, to begin loading about the 19th December, and the remainder of the 1,000 tons to a vessel to load the latter part of December or early in January, 1882, vessels to be furnished by Mr. De Leon.

"READ & Co."

On the same day (December tenth), Rasin & Co. delivered both papers to De Leon, who, as the jury have found, received them, and upon the faith and credit induced thereby, paid to Rasin & Co., the sum of \$24,450. The defendants subsequently, and before the time fixed for delivery, gave to De Leon notice in writing that they would not execute the accepted order or fulfill the contract. The defendants set up by answer, and also upon the trial, that they received no consideration for the acceptance and agreement, and were induced to execute the same by certain false representations made to them by Rasin & Co., and, in substance, that De Leon as

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privy thereto, colluded and conspired with Rasin & Co. to make a colorable and apparently *bona fide* transfer of the writings for the purpose of cheating the defendants. The jury found against these allegations.

It appeared that, in fact, Rasin & Co. were insolvent and had not paid Read & Co. for the goods. The defendants upon the trial claimed a right to retain them, and concerning that the learned trial judge charged the jury: "If you believe that Mr. Read thought, when that paper was signed by him for the purpose of being delivered to Mr. De Leon, that it would lead Mr. De Leon to the opinion that he was to have the ownership of these goods on the day mentioned in that paper, in the letter for the delivery of them, and that that possession was not to be interfered with by any claim on the part of Messrs. Read for their vendor's lien, why, then, gentlemen, you will say so by your verdict. If you believe that that paper was meant to convey the effect on Mr. De Leon's mind that he was to have the possession of the articles in question free from the vendor's lien, and that Messrs. Read, in signing that paper, intended to convey that fact upon De Leon's mind, you will find a verdict for the plaintiff. If, on the other hand, you believe that Messrs. Read, in signing that paper, intended to reserve their vendor's lien, and had no intention whatever to convey any other idea to Mr. De Leon, then, gentlemen, you will find for the defense."

The verdict in plaintiff's favor, therefore, established that the intention of Read & Co. was to give assurance to De Leon that he was to have the goods free from any claim on their part. The General Term sustained the recovery, and we are brought to the inquiry whether any error of law was committed by the trial judge which requires a new trial. But as the appeal has been put in a great degree upon the relations between Read & Co. and De Leon and Rasin & Co. in respect to the property in question, a statement concerning the facts on which those relations depend, will be necessary. All the parties were dealers in fertilizers, and Read & Co. and Rasin & Co. were also manufacturers. On the 17th of September,

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1881, an agreement was made between De Leon and Rasin & Co., by which in December, 1881, and January, 1882, Rasin & Co. were to supply De Leon with 2,000 tons of fertilizers at twenty-four dollars per ton, and he was to pay therefor by notes maturing from November 1 to December 15, 1882, without interest. De Leon undertook to supply the article to other parties, and Rasin & Co., having delivered only 300 tons, were repeatedly urged by De Leon to complete delivery so as to enable him to fill his orders. Read & Co. had had dealings with Rasin & Co., and about this time solicited further orders, and an agreement in writing was made between Read & Co. and Rasin & Co., of which the following is a copy :

“ATLANTA, Ga., *December 7, 1881.*

“We have to-day sold to Messrs. R. W. L. Rasin & Co., of Baltimore, Md., one thousand tons ammoniated super-phosphates at twenty-four (\$24) dollars per ton (2,000 lbs.), on a cash basis, goods to be delivered free on board buyer's vessels, and by us in bulk. We guarantee the analysis of goods to be not less than 2 per cent of ammonia, and not less than 8 per cent of available phosphoric acid, sampling and analysis of each shipment to be made by A. R. D. Dane & Co., of New York, or by Prof. White of Georgia. Settlements are to be made on delivery to buyers of bills of lading, by their notes, with 6 per cent interest added. For the convenience of sellers, buyers agree to make their notes at four months, with the understanding that they are to be renewed, so as to mature finally not later than December 10th and December 20th, 1882, say one-half each date. Shipment to be made as early as possible during this month.

“READ & CO., of *New York.*

“We accept the above.

“R. W. L. RASIN & CO., *Baltimore, Md.*

“Messrs. Read & Co. have the option of furnishing an additional one thousand tons on above terms within twenty days from this date.”

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The evidence tended to show that this agreement was made by Rasin & Co., because of the non-completion of their new factory and consequent inability to keep their agreement with De Leon, who was "pressing them for a delivery," and that Read & Co., before their acceptance of the order making the memorandum above set out, were notified of this difficulty and of the desire of Rasin & Co., to give De Leon their goods in order to fulfill the contract. On the same day (December 10, 1881), Read & Co. billed the goods to Rasin & Co. at twenty-four dollars per ton, with interest to December 15, 1882, amounting to \$25,428, and credited Rasin & Co. with their notes then given, ten in number, each for \$2,542.80, maturing at different times and in all amounting to the same sum of \$25,428.

In my opinion the record shows two mutual and independent contracts, for the breach of either of which an action would lie. There was one contract between Rasin & Co. and Read & Co., and another contract between Read & Co. and De Leon. The first is of no importance to the parties in this action if the second is valid, and if by it De Leon was induced to advance money to Rasin & Co., upon the belief that Read & Co. intended to become bound according to its terms. The right thus created could not be put an end to by annulling the contract between Rasin & Co. and Read & Co. The reasoning of the court in *Briggs v. Sizer* (30 N. Y. 647), is to the effect that it is not necessary there should be a consideration moving from the payee to the drawee of such an order as the one now before us, to support an acceptance; that as in the case of a bill of exchange the consideration for the acceptance moves between the drawer and drawee, and not between the holder and acceptor, and the whole argument of the learned judge writing in that case, goes to show that after acceptance of an order for merchandise, a privity is established between the payee and acceptor, which makes the latter liable at the suit of the payee. In that case, however, there was no actual acceptance, but only facts from which it was sought in vain to infer an acceptance, and the court say, there being no

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acceptance, the action must fail. The order or draft in that case was for merchandise; it was similar in form to that at bar, and it is plain the conclusion of the court as to the effect of an acceptance, had one been made, would be decisive in favor of the plaintiff here. But as there was in fact no acceptance, it is argued by the appellants that the reasoning is uncalled for by the circumstances, and the opinion *obiter*, and so not decisive in any other case. The observations of the court were not mere *dicta*, but the main part of an argument expressive of a deliberate and carefully considered opinion. It is, therefore, entitled to weight, and the principle upon which it stands, is applicable to the case at bar.

As most favorable to the appellants, let us assume that there was no consideration between Read & Co. and Rasin & Co., *i. e.*, between drawer and drawee, and that Read & Co. accepted without consideration, simply for the accommodation of Rasin & Co., or even that the acceptance was procured by representations of Rasin & Co., which were in fact false, but not known to be so by either Read & Co. or De Leon. In such a case, until actually delivered to De Leon, the acceptance might have been withdrawn or revoked, and so it might have been even after delivery to De Leon and until, without notice, he had made advances on the strength of it, or in some other way changed his position; for until that event, he was not a party to the contract. But the moment he, relying on this acceptance, paid Rasin & Co. for the goods, he became a holder for value of the acceptance and a party to the contract. For such payment indicated his assent to the obligation, and the promise of Read & Co., which was before a mere naked promise, became clothed with a consideration and a new debt was contracted in his favor.

A point is made by the appellant that "by the delivery of the order and memorandum the property in the goods did not pass to De Leon." These papers, the learned counsel argues, "are not *indicia* or documents of title, nor *quasi* negotiable." If I am right in the view already expressed as to the effect of the acceptance by Read & Co. and the pay-

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ment of money by De Leon, the question raised by the appellants' proposition as to the effect of a mere delivery order is quite irrelevant and constitutes no legal excuse for the non-delivery of the goods. It may be conceded that if De Leon were to be regarded merely as an assignee, although for value, of a bill of lading or a delivery order, or a warehouse receipt, his right to recover would depend upon the title or right of his assignor, and thus be subject to any defense which might exist against Rasin & Co. The appellants cite authorities to that effect; among them and as applicable as any others are *Collins v. Ralli* (20 Hun, 246, and 85 N. Y. 637); *Hentz v. Miller* (94 N. Y. 64); *Farmeloe v. Bain* (L. R., 1 C. P. Div. 445); *Imperial Bank v. London & St. Katharine Docks Company* (L. R., 5 Ch. Div. 195, 200). But to what effect are the authorities? In *Collins v. Ralli* there was a very able and instructive opinion, which, upon appeal, was adopted by this court (85 N. Y. 637) and afterwards cited with approval (94 N. Y. 64). Omitting matters not now material, it went upon these circumstances: One Cutter, by fraud, induced the plaintiff to sell certain bales of cotton to mills which he assumed to represent, and deliver to him a bill of sale running to the mills. In like manner he procured a delivery order upon the warehousemen who had the cotton in store, and there he marked the cotton with the address of the mills. He next stored the cotton in another warehouse, taking receipts in his own name and afterwards in the name of his brokers. The marks were then removed from the bales, and the defendants bought the cotton in good faith for value and shipped it to Liverpool. The plaintiffs sued them for the value of the cotton, and recovered upon the ground that Cutter was guilty of larceny in fraudulently obtaining the custody of the cotton and converting it to his own use; and as the plaintiff had never conferred upon him the apparent title thereto, or any authority to dispose thereof, the plaintiff was not estopped from reclaiming it from the defendants.

The case turned upon the propositions that the fraud of Cutter was equivalent to larceny, and the absence of an *indicia*

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of title conferred on him by the plaintiff. The learned court, applying the doctrine of *McNeil v. Tenth National Bank* (46 N. Y. 325, 329), added: "If plaintiff clothed Cutter & Co. with apparent title or power to sell, or did anything out of the usual course of business calculated to, and which actually did, mislead the defendants in respect to the ownership or right of sale of the cotton, it would clearly be inequitable to permit the plaintiff to recover therefor from the defendants, who had parted with their money on the faith and credit of the appearances so created by him, the principle of estoppel would apply." And, referring to the defendants' claim that this was affected by the delivery orders, say: "These orders were the means adopted to put Cutter in temporary possession of the cotton so that it might be shipped to his assumed principals," adding, they "worked no harm to any one. They were not seen by defendants, or any person representing them, and their existence even was unknown to them," so that, even if the delivery order indicated title, it would furnish no support to their claim of estoppel. But it was also held that such an order related only to the possession, and that its purpose was served when it was delivered to the warehouseman, and he obeyed it; and the elementary rule that bare possession is not sufficient to enable one to convey title was applied. But the distinction between such a case and that of a person procuring the sale of goods by reason of false pretenses was adhered to. The learned court referred to the fact that in the case then in hand there was no sale, no purchase, and so the title remained in the plaintiff, and no doubt was entertained that if by fraudulent contrivance a person induced the sale and delivery of goods to himself, he could convey a good title to a *bona fide* purchaser for value, so long as the original owner had not exercised his right to revoke the sale and reclaim his goods. *Hentz v. Miller* (*supra*) goes no farther and holds that, so far as the real owner has allowed another to have the appearance of ownership, he is estopped from setting up his own right. The other cases cited only show that a delivery order, or other similar instrument, gives the

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assignee no greater right of action than the assignor had, although by its terms it runs to the promisee or his assignee. They show that such a document is not a negotiable security, and clearly it is not. In *Farmelos v. Bain* (*supra*), for instance, the plaintiff took as indorsee an instrument made by the defendant to Burrs & Co., in these words: "We hereby undertake to deliver to your order indorsed hereon, twenty-five tons merchantable sheet zinc, off your contract of this date." On the strength of this paper, indorsed by Burrs & Co. to the plaintiff, they accepted bills drawn by Burrs & Co. It was held that the giving of this undertaking did not estop the defendants from setting up against the plaintiff their right, as unpaid vendors, to withhold delivery, and that Burrs & Co. were not at liberty to transfer to their vendees a property in the zinc which they themselves did not possess. The plaintiff contended that the undertaking was a representation that the zinc belonged to Burrs & Co. free from any lien, and sought to apply the doctrine of equitable estoppel, but failed, because it stated no fact, and left the indorsee or assignee to recover, if at all, on the case of his assignor. So in *Imperial Bank v. London and St. Katharine Docks Company* (*supra*), the plaintiff claimed by indorsement under a delivery order, and the defendant justified in substance under the title of a vendor's lien for unpaid purchase-money of the goods in question, and succeeded, the court holding that so long as the vendor was in possession "as vendor and in no other character," and was unpaid, he could maintain his lien as vendor, notwithstanding he had given a delivery order. Therefore, it may well be as the appellant contends, settled law, that the indorsement and transfer of a dock warrant or warehouse certificate, or other like document of title, by a vendor to a vendee, will not divest the vendor's lien. The present case is not governed by such doctrine. We have here a very different thing. A contract or promise from the vendor directly with and to the plaintiff, not resting on representation or assignment, but upon novation — a new debt or undertak-

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ing in place of the old. Nothing is transferred from the assignor to the assignee; the debt due the original vendor is extinguished and a new one created by the acceptance. Read & Co., from the moment of acceptance, became bound as bailees to De Leon, at first contingently upon the payment by him on the faith of the acceptance, and upon that payment absolutely. They no longer held the character of vendor only, but were acceptors, and by assuming that character an end was as effectually put to the vendor's lien as if there had been an actual delivery of the goods to the vendee, or they being in a common store, the warehouseman had on the seller's order transferred them on his book to the purchaser. In either case there is, in legal effect, an actual change of custody. In the case of a mere assignment of a warehouse receipt, or an assignment of a delivery order, it has been held that neither amounts to a constructive delivery of the goods covered by it, but where the warehouseman is notified of the assignment, and agrees to hold the goods for the assignee, such effect is to be given to it. (*Wilkes v. Ferris*, 5 Johns. Rep. 335; *Briggs v. Sizer*, *supra*; Addison on Contracts, 959.) This author sums up the doctrine by saying: "If the goods have been resold, and the second purchaser has received from his immediate vendor, the first purchaser, a delivery order addressed to the original vendor, which has been accepted by him, the original vendor cannot, after he has thus attorned to such second purchaser, refuse to deliver the goods to such second purchaser, pursuant to his acceptance, although the first purchaser to whom he sold became bankrupt before delivery, and before payment of the price, and the goods were not weighed or measured over prior to the bankruptcy of the first purchaser."

In the case before us the transaction implies a title in De Leon, and the receipt not only acknowledges that, but contains an express promise to deliver the property to him. The transmutation of title is, therefore, as complete as if produced by the attornment of a warehouseman or dock-master to the holder of a dock warrant or delivery order.

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More in point to the case actually before us, and in contrast with those cited by the appellants, is *Armour v. Michigan Central Railroad Co.* (65 N. Y. 111). The action was upon two bills of lading or carrier's receipts, issued in the name of the defendant by its agent. The defense was (1) that they were issued by him without authority, he being authorized to bind the company only for goods actually shipped, and there were none; (2) that he was induced to issue them by fraud practiced by one Michaels. The facts were that Michaels presented to the defendants' agent a receipt purporting to be signed by one S., a warehouseman, for 200 packages of lard in store for account of Michaels, "and subject to the return of the receipt properly indorsed." This was delivered to the defendant's agent, accompanied by the order of Michaels for 100 packages, and afterwards a similar order for 100 other packages, and in each instance the defendant, by its agent, executed and delivered to Michaels a carrier's receipt acknowledging the receipt from him of one hundred packages of lard consigned to the plaintiffs at New York, and to be there delivered to them. The defendant, at the time the receipts were given, was informed by Michaels that he intended using the same at bank the same day. He did so by drawing on the plaintiffs for \$3,600 in each case, and attaching to the respective drafts one of the bills of lading. The bank discounted the drafts and forwarded the same to New York for collection. They were paid by the plaintiffs on the faith of the defendant's receipts, and the lard not being delivered they sued the defendant. They recovered before the referee for three packages, but were defeated as to one hundred and ninety-seven of them for reasons which are not involved here. At General Term the decision of the referee was affirmed, but upon appeal the judgment was reversed upon grounds showing that in the opinion of the Commission of Appeals they were entitled to a full recovery upon both receipts. One commissioner stated that the principle that a party, who, by his admissions, has induced a third party to act in a particular manner, is not permitted to deny the truth of his admission if the conse-

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quence would be to work an injury to such third person, applied to and governed the case; in substance, saying that the defendant having been the cause of the advances made by the plaintiffs, must be held to have intended what was in fact the legitimate consequences of its own misstatements. The commissioners call attention to the fact that the bills or carrier's receipts run directly to the plaintiffs, that they were not assignees of bills made to Michaels, but that the contract to deliver the lard was made directly with them, and distinguish the case from one where title is made by assignment and the assignee takes only the right and place of the assignor, adding "the fact that a bill of lading is not negotiable has nothing to do with the question." That point would have been open for discussion if the bills had been issued to Michaels and then assigned to the plaintiffs. As it was, the representation having been made direct to the plaintiffs, their right of action is not derived through Michaels, but rests upon the direct relations between itself and the plaintiffs.

These positions in every aspect support the respondent here and are warranted, it is believed, by a line of well-settled decisions, and, among others, by *McNeil v. Tenth National Bank* (*supra*); *Moore v. Metropolitan National Bank* (55 N. Y. 41), and *Voorhis v. Olmstead* (66 id. 113). Another strong case in the plaintiff's favor, and much in point, is *Knights v. Wiffen* (L. R., 5 Q. B. 660). There M. bought barley from B., and, without paying for or receiving the same, sold it to D., gave an order on B. for its delivery and received payment. D.'s agent showed the order to M., who said it was all right and when a note for forwarding was received he would ship the barley. M. became bankrupt, and the defendant, setting up a vendor's lien, refused to deliver the barley. D. sued B. for the barley. The court held him estopped, because if he had refused assent to the order, peradventure D. might have received the money paid M., at least he had altered his position by abstaining from the attempt. This case is cited and followed under somewhat similar circumstances by this court in *Voorhis v. Olmstead* (*supra*). The present is much

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stronger for the plaintiff because here the plaintiff actually paid his money on the strength of the acceptance, and not in expectation of it, and in this respect also the defendants knew the plaintiff would act upon it. In *Knights v. Wiffen* (*supra*), the defendant was his own warehouseman, as was the defendant in the case before us.

The appellants argue that the contract between Read & Co. and Rasin & Co. was executory. I find nothing in the writing to warrant that contention. It purports to be, not an agreement to sell, but an actual sale; not an agreement to manufacture and deliver, but a sale as of existing property, to be delivered at a time fixed, and payment was in fact made by Rasin & Co. by notes executed and delivered to Read & Co., and accepted by them in settlement before the acceptance of the order in favor of Read & Co. was given. Nothing more remained to be done by Rasin & Co., nothing by Read & Co. save to make delivery. But however that may be, and whatever construction should be given to that contract, there is no ambiguity or doubt as to that between Read & Co. and De Leon. There is nothing in it to suggest to De Leon the existence of any incident or circumstance which makes the obligation of Read & Co. less than absolute, or the interest of Rasin & Co. in the goods other than that of a purchaser having a perfect and complete title. The order calls for goods "sold" to the drawer. The acceptance is an agreement to deliver those goods. There is no reference to a contract to sell, or to any executory, or incomplete or unexecuted contract, but to a perfected result. The order and acceptance is a representation in effect that Rasin & Co. are the owners of the goods then held by Read & Co. But it is said upon evidence outside the writing that the goods were in fact to be manufactured, that Read & Co. had indeed the ingredients but had not compounded them. The cases of *Griswold v. Haven* (25 N. Y. 595), *Knights v. Wiffen* and *Armour v. Railroad Company* (*supra*), show that this is no answer. The reply may be given in the language of BLACKBURN, J., in the former case, "that when one

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states a thing to another with a view to the other altering his position, or knowing that as a reasonable man he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement." So are the other cases and such is the general doctrine (2 Smith's Law Cases, [7th Am. ed.], 668.) The verdict of the jury establishes not only that such was the effect of the defendant's statement to De Leon, but that such effect was looked for and intended by them when making it. (*Farmeloe v. Bain* (*supra*), much relied on by the appellants and already referred to is in no degree in opposition to the plaintiff's case, but stands on a different theory. There the plaintiff claimed as assignee, stood in the place of the original vendee, and took by virtue only of his contract and with notice, and by the language of the agreement he might be deemed put upon inquiry as to the nature and terms of the contract, in fulfillment of which the defendant made his promise.

Upon the subject of damages, the learned trial judge charged that if the plaintiff recovered he would be entitled to the value of the property at the time fixed for delivery, with interest from that time. A general exception was taken by defendants, but no suggestion made as to any other measure of damages. We find no error. As owner of the goods, De Leon was entitled to them or to their value. In no other way could he be made good, and the plaintiff, as assignee, stands in his place. The other questions raised have been considered, but disclose no errors affecting the case.

The judgment should be affirmed.

RAPALLO, EARL and FINCH, JJ., concur with PECKHAM, J.;
RUGER, Ch. J., and ANDREWS, J., concur with DANFORTH, J.
Judgment reversed.

Statement of case.

HANNAH M. WOODARD, as Administratrix, etc., Respondent,
 v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD
 COMPANY, Appellant.

106	369
194	315
194	418
126	411

In an action to recover damages for alleged negligence on the part of defendant causing the death of W., plaintiff's intestate, it appeared that W. was struck by one of defendant's cars and killed at a street crossing in the village of H. Six tracks cross the street at this point. W. approached the crossing along the street on foot from the north, the line of the street and of the rails as they approach, the former from the north, the latter from the west, make quite an acute angle. The first track is a switch, and the car which struck W. was not attached to any engine, but was pushed or "kicked" down from the west on said track; it was moving by its own momentum at a rate of not over four miles an hour. The accident occurred in the middle of a bright, clear day. Up to a point on the street thirty-one and a half feet northerly from the crossing the switch could not be seen, as a building obstructed the view, but at that point it could be seen to the west for a distance of fifty-seven feet from the crossing. When within ten feet of the track it could be seen one hundred and thirty-seven feet. The switch was used for the delivery of coal for the village, and the cars containing coal were habitually shunted down the switch to the place of delivery. W. was employed in a coal yard near the crossing and was perfectly familiar with the crossing and the use made of the switch. *Held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that the facts made it absolutely certain either that W. looked and, seeing the car coming, undertook to cross in front of it, or did not look when it was his duty, and was, therefore, chargeable with contributory negligence; and that a submission of the question to the jury was error. Also *held*, the fact that trains were moving past the crossing on the other tracks, south of the switch, did not authorize an inference that the decedent's attention was so diverted as to excuse his omission to look and see if the track was clear.

Greany v. Long Island Railroad Company (101 N. Y. 419) distinguished.

(Submitted February 2, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for alleged

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negligence, causing the death of Philo P. Woodard, plaintiff's intestate.

The material facts are stated in the prevailing opinion.

E. C. Sprague for appellant. The evidence, with all the inferences which the jury could probably draw from it, was insufficient to sustain plaintiff's cause of action, and, therefore, a nonsuit should have been granted. (*Wilds v. R. R. Co.*, 24 N. Y. 430; *Randall v. R. R. Co.*, 109 U. S. 478, 482; *Reynolds v. R. R. Co.*, 58 N. Y. 252; *Harnett v. B. & F. F. R. R. Co.*, 49 J. & S. 185.) Plaintiff's intestate had abundant opportunity when in a place of absolute safety to discover the approach of the cars, and by his failure to do so he was guilty of contributory negligence. (*Baxter v. T. & B. R. R. Co.*, 41 N. Y. 502; *Davies v. N. Y. C. R. R. Co.*, 47 id. 400; *Salter v. U. & B. R. R. Co.*, 75 id. 279; *Hartz v. R. R. Co.*, 42 id. 471, 473; *Reynolds v. N. Y. C. R. R. Co.*, 58 id. 248; *Mitchell v. N. Y. C. R. R. Co.*, 64 id. 655; 2 Hun, 535; *Haycroft v. R. R. Co.*, 2 id. 489; 64 N. Y. 636; *Cordell v. R. R. Co.*, 75 id. 330; *Wilcox v. R. R. Co.*, 39 id. 358; 70 id. 125; *Beisiegel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.] 29; 40 N. Y. 9, 11, 20; *Haight v. N. Y. C. R. R. Co.*, 7 Lans. 11; *Ormsbee v. R. R. Co.*, R. I. Sup. Ct. 1883; *S. C.*, 27 Alb. L. J. 426; *Thompson v. R. R. Co.*, Sup. Ct. 1st Dep't, May, 1884; 19 N. Y. Week. Dig. 347; 33 Hun, 16, 23; *Penn. R. R. Co. v. Richter*, 42 N. J. 180; *S. C.*, 2 Am. & Eng. R. R. Cas. 220; *Abbott v. R. R. Co.*, 30 Minn. 482; *Md. Cent. R. R. Co. v. Newbern*, Md. Sup. Ct. 1885; *Pzolla v. Ry. Co.*, Sup. Ct., Mich. 1885; *Moore v. Ry. Co.*, Sup. Ct., Penn. 32 A. L. J. 98; *Wheelwright v. B. & A. R. R. Co.*, 135 Mass. 225, 230; *Wilds v. R. R. Co.*, 24 N. Y. 430; *Mynning v. R. R. Co.*, 23 Am. & Eng. R. R. Cas. 317; *Grippen v. R. R. Co.*, 40 N. Y. 34, 51; *Gorton v. R. R. Co.*, 45 id. 660; *Becht v. Corbin*, 92 id. 658; *McGinnis v. R. R. Co.*, 7 Alb. L. J. 172; *McGrath v. R. R. Co.*, 14 Week. Dig. 574; *Mahlen v. Ry. Co.*, 49 Mich. 585, 589; *Hamm v. Ry. Co.*, 18 J. & S. 78;

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State v. R. R. Co., 76 Me. 357; *Tully v. R. R. Co.*, 134 Mass. 500; *Leason v. R. R. Co.*, 1 East. Rep. 100; 77 Me. 85; *Davenport v. R. R. Co.*, 100 N. Y. 632.) The natural instinct of one to preserve himself from injury, cannot take the place of proof of due care and lack of contributory negligence. (*Chase v. R. R. Co.*, Me. 1 East. Rep. 96.)

E. Countryman for respondent. It is very gross negligence for a railroad to "kick" or send unattended cars on a flying switch over a street crossing in the populous part of a city or village. (*Brown Case*, 32 N. Y. 597; *Stitwell Case*, 34 id. 29; *Butler Case*, 28 Wis. 487, 494; *Garvey Case*, 58 Ill. 83; *Dignon Case*, 56 id. 437; *Frontman Case*, Penn. Sup. Ct. 11 Week. Notes, 453, 455.) Whether under all the circumstances, after looking once, the deceased should have looked again or continued looking, was for the jury to determine. (*Glushing Case*, 96 N. Y. 676; *Weber Case*, 67 id. 587, 588; *Greany Case*, 101 id. 420, 426, 427; *Brown Case*, 32 id. 597, 603; *Stilwell Case*, 34 id. 29; *Beisiegel Case*, 34 id. 622; *S. C.* [last appeal] 11 Abb. [N. S.] 29; *Ingersoll Case*, 6 T. & C. 416; Affirmed, 66 N. Y. 612; 34 N. Y. 623, 624, 626, 627, 630, 631; *Mackey Case*, 35 id. 78; *Richardson Case*, 45 id. 849; *Davis Case*, 47 id. 403; *Ogeir Case*, 35 Penn. 60; *Howard Case*, 32 Minn. 214, 216; *Ferguson Case*, 63 Wis. 145, 151, 152; *Garvey Case*, 58 Ill. 83, 84, 85; *French Case*, 116 Mass. 537, 540, 541; *Van Steinburg Case*, 17 Mich. 100, 118, 120, 123, 124; 6 T. & C. 419; 66 N. Y. 612; 35 Penn. 71, 72.) While the vigilance and caution of the traveler must be proportioned to the known danger of injury it is also in a measure limited by the usual and ordinary signals and evidences of danger. (*Weber Case*, 58 N. Y. 458; *Johnson Case*, 20 id. 66; *Stead Case*, 95 U. S. 161; *Wanless Case*, L. R. 7 Eng. App. 12.) The traveler is not obliged to stop for the purpose of looking and listening before passing on to the crossing, unless there is a signal of danger given to him. (*Beisiegel Case*, 34 N. Y. 622; *S. C.*, 14 Abb. [N. S.] 32, 33; *Ernst Case*, 35 N. Y.

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10; *Kellogg Case*, 79 id. 72.) While previous knowledge, by a party injured, of a dangerous situation imposes a greater degree of care in approaching it, yet the degree of care required of such person is always a question of fact to be determined by a jury. (*Palmer v. Dearing*, 93 N. Y. 7; *Bernhardt Case*, 1 Abb. App. Dec. 134; *Wolfkiel Case*, 38 N. Y. 49; *Weber Case*, 58 id. 455; *Morrison Case*, 63 id. 643; *Hart Case*, 80 id. 622; *Payne Case*, 83 id. 572; *Powell v. Powell*, 71 id. 71; *Ernst Case*, 35 id. 41; *Wilds Case*, 24 id. 430; *Randall Case*, 109 U. S. 478; *Reynolds Case*, 53 N. Y. 248; *Baxter Case*, 41 id. 502; *Harty Case*, 42 id. 468; *Davis Case*, 47 id. 400; *Salter Case*, 75 id. 273; *Mitchell Case*, 64 id. 655; *Haycroft Case*, id. 636, 637; *Cordell Case*, 75 id. 330; *Wilcox Case*, 39 id. 358; *Haight Case*, 7 Lans. 11; *Thompson Case*, 19 Week. Dig. 347; 33 Hun, 16; *Gorton Case*, 45 N. Y. 660, 661; *Becht Case*, 92 id. 658; *Grippen Case*, 40 id. 34; *Bunn Case*, 6 Hun, 303; *McGrath Case*, 14 Week. Dig. 574; *Harnett Case*, 17 J. & S. 185; *Brassell Case*, 84 N. Y. 245; *Hinckley Case*, 120 Mass. 257, 262, 263; *Clark Case*, 128 id. 1; *Wright Case*, 129 id. 440; *Ormsbee Case*, 14 R. I. 102.)

FINCH, J. It is impossible to read the charge with which the learned trial judge submitted this case to the jury without a strong conviction that his judgment hesitated upon the verge of a nonsuit, which we think he should have granted. He may have believed that, with the clear demonstration which he gave of the plaintiff's failure to show directly or by reasonable inference that the conduct of deceased was free from negligence contributing to the injury, the jury would render an appropriate verdict upon the question submitted as one of fact. The result, however, was, as commonly happens, in favor of the plaintiff, and the case comes here on appeal from that conclusion.

There is substantially no dispute about the facts. Two tracks of the Erie Railroad, one known as the Buffalo division main track, and the other as the western division main track,

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cross Canisteo street in the village of Hornellsville at an oblique angle. North of the Buffalo track is what is called the Osborn house switch, which leaves the main track at a point westerly from the street and crosses it nearly parallel with the main line, but leaving an open space between, at the narrowest point, of seven and one-half feet. Between the two main tracks there is an open space of ten feet six inches, and south of that are other switches. The map shows that in all there are six tracks crossing Canisteo street; the line of the street and of the rails making quite an acute angle as they approach each other from the north and west. Philo P. Woodard, the plaintiff's intestate, was employed at a coal yard owned by one Houck, which fronted on Canisteo street and ran back to the premises of the railroad. While so employed he became entirely familiar with the crossing, and especially with the use made of the Osborn house switch. Upon that was placed the coal destined for delivery in Hornellsville, and the cars containing it were habitually shunted down that switch and across the street to the place of unloading. The plaintiff himself had often inquired at the freight office for his employer's coal, and directed upon what switch the cars should be placed. One coming south-easterly along Canisteo street from Houck's coal yard would have at his right, first, a vacant lot bounded by a high fence toward the rails, and, next, a building known as Crotty's store. While passing that the track west of the crossing could not be seen, but when the south-eastern corner was reached, being thirty-one and a half feet from the intersection of the street with the rails, the switch could be seen to the west a distance of fifty-seven feet. When within ten feet of the track it could be seen a distance west of 137 feet, and the map shows that when within two feet of the track the switch could be seen for its whole length to the west, and some stretch of the main track besides.

The plaintiff's intestate and one Phelps approached the crossing carrying a basket of coal brought from Houck's, and deceased was struck at the southerly rail of the switch,

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and when almost across it, by one of the coal cars kicked down from the west and moving by its own momentum. The accident occurred in the middle of a bright and clear day, when nothing existed to obstruct or hinder the sight, when the injured man was on foot and could have stopped at any instant, and when the merest glance along the switch to the west would have developed the approaching danger. The car and the man met at the intersection of track and of street. The highest speed of the former is put at four miles an hour, and if we call the walk of the latter as slow as one mile an hour the cars moved four feet while he moved one, and when he was ten feet from the crossing they were but forty feet from the crossing, and moving down upon it in plain sight. If he was walking faster they were still nearer, and it is absolutely certain that at any time when within ten or fifteen feet deceased had only to look and pause to be safe. Indeed, Cook, called for the plaintiff, swears that the cars were within ten or twelve feet of them when the two men stepped upon the track, so that the facts make it absolutely certain that Woodard and Phelps either looked and, seeing the car coming, undertook to cross in front of it, or did not look, when that was their duty, and went blindly upon the track, taking the chances of what might occur. The evidence is very slight that either of them looked to the west at all after passing Crotty's store. Phelps admits that he looked only while passing that store, and so at a time when he knew that he had not guarded against the danger of the shunted cars likely to come upon the crossing at any hour of the day; but if they did look after passing that point the inference is inevitable that they saw the cars coming and misjudged their ability to cross in their front. The case is one where ordinary prudence and care was not shown or inferable, and for which no excuse or palliation can be given.

For the theory that their attention was diverted by the passage of a train to the west on one of the tracks south of the switch and the movement of some coal dumps on another, so far from being an excuse for not looking as they approached

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the switch, is itself an admission of the lack of ordinary prudence. It concedes that they did not look for cars approaching on the switch and seeks to excuse the omission. If they did look, after passing the store, they saw the coal cars coming and could not help it, and any excuse for not looking is immaterial. Nothing in their situation or surroundings made it their duty to watch a train passing on another track and rapidly clearing the crossing. Looking at that could do no good and subserve no useful purpose, and did not affect or influence deceased's action while approaching the switch, and the excuse amounts to this and this only, that a man may prudently step upon one track without looking to see if it is clear, because he sees cars on another track which do not menace his safety or affect his action. A passing wagon on the street, or a new sign on some building might equally have diverted his attention, but the fact in each case would only have shown his lack of ordinary care and prudence. The west bound freight train had nearly left the crossing when deceased was struck, and constituted neither obstruction nor danger to his further passage. One does not approach a railroad track with senses alert and watchful when he suffers his attention to be needlessly diverted from the present and immediate danger. To be an excuse the object or cause which so diverts the attention, must be something which can justify, consistently with prudence, the withdrawal of attention from the near and imminent danger. Otherwise it is mere needless curiosity which itself amounts to inattention.

As has become quite common, the case of *Greany v. L. I. R. R. Co.* (101 N. Y. 419), is cited as authority to support the plaintiff's judgment. That case was close enough upon its facts to invoke a considerable dissent, but its decision turned upon features not here presented. There the plaintiff herself testified that her crossing was blocked by a train standing at a station and she stopped waiting for it to move. Its presence affected her action and properly engaged some part of her attention. She further said that she stopped just as it started; that as she came up to the track she stood and looked both ways

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and saw nothing; that she took a step or two and just as she did so saw a train coming from the east, but so close that she could not escape. It was coming at a dangerous rate of speed. Here the coal cars were moving without an engine at about four miles an hour, and the west bound freight was on the third track ahead of deceased, with two open places, one of seven and one of ten feet intervening, and clearing the crossing at a rate which left deceased's progress entirely unaffected. The men were on foot, wholly masters of their own movements, and whether they looked or did not look as they approached the track, their conduct was negligent. There was no question for the jury to pass upon and the plaintiff should have been nonsuited.

The judgment should be reversed and a new trial granted; costs to abide event.

DANFORTH, J. (dissenting). The action was to recover damages for injuries sustained by the next of kin of Philo P. Woodard, from one of the defendant's trains having struck and killed him while walking with one Phelps on a public street in the village of Hornellsville. The case was submitted to a jury, and they found for the plaintiff. The defendant moved at Special Term, upon a case and exceptions, for a new trial. It was denied, and after judgment the defendant appealed from the order denying a new trial and from the judgment, to the General Term, where both were affirmed. It now appeals from the decision of the General Term and brings up for review the order and judgment.

In support of the appeal, the learned counsel for the appellant argues that the trial court erred, first, in refusing to grant a nonsuit when moved to do so, "upon the ground that the proof did not show that the deceased was free from contributory negligence," and second, in refusing to charge in certain particulars as requested by him.

The court, after calling the attention of the jury to the facts in evidence so fully and fairly as to suggest to the defendant no need of alteration or addition, said: "The law

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required of Woodard, in crossing that railroad, that he should look in every direction from which danger was liable to approach, and if he saw a train of cars or a single car approaching him in such manner as to threaten him with collision, it was his duty to stop and wait for it to pass, or to hasten his steps so as to cross before it reached him; and this he must do at his own risk. But the evidence is that these men did not see the cars that were approaching. The plaintiff has proved by Phelps that he did not see the cars approaching; that after he passed the corner of the Crotty building he turned his eyes in that direction and did not see them approaching. What was the reason of that? The cars were approaching and the atmosphere was clear, and his eyesight was good enough to enable him to perceive them. Was it because his look in that direction was before he arrived at the point from which he could see up the track to where the cars were? If so, and he did not look again, he was guilty of negligence which would prevent him from recovering for any injury he received, unless there was something else to draw off his attention at the time he might have seen these cars approaching." After some other remarks, he added: "In discussing this question, you are to inquire, did Woodard exercise that degree of care and caution for his own safety, which a reasonably careful and prudent man would have exercised under the same circumstances. If that fact is established satisfactorily to your minds, a cause of action is made out, and the plaintiff is entitled to recover; if not, no cause of action has been made out."

No exception was taken to this or any other exposition of law applicable to the evidence, but the defendant's counsel at the close asked the court to charge the jury that "the proof showed that the approaching cars which struck Woodard could be seen during the entire time he was crossing ten feet to the track, and that he had ample opportunity to see them, notwithstanding the passage of the other trains."

The Court: "I think I have covered that ground. I have said that the cars were in sight during the time he was passing

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over those ten feet, and unless there was something else that distracted his attention, he was bound to have seen them." Nor was there any exception taken to this statement. The learned counsel then requested the court to charge, "as matter of law," "that there was no passage of other trains sufficient to justify him in not looking." The court replied "I leave the question to the jury." To this there was no exception. The learned counsel for the defendant subsequently asked the court to charge "that as a general rule, a party approaching a track is bound to look for approaching trains up to the time he steps on to the crossing."

By the Court: "As a general rule, that is so." Having looked at a distance of ten feet or fifteen feet from the rail, and not seeing an approaching train, would not relieve him from the responsibility of looking again. It is only for the jury to say whether there were circumstances which properly attracted and diverted his attention from the approaching cars, and to this the counsel for the defendant excepted.

The propositions which allege error must stand or fall upon facts disclosed on the trial, and so require from us an examination of the entire evidence, for the contention of the appellant now is that no facts are established "from which the negligence of the defendant and the absence of contributory negligence on the part of Woodard could be legitimately inferred." And this examination is to be made in view of the entirely well settled rule uniformly applied by the courts when the issue is one of fact, and the case triable by a jury, that the question cannot be taken from them if the evidence in any reasonable view would warrant a verdict; or, as was said in the recent case of *Bagley v. Bowe*, (105 N. Y. 171), "if there is ground for opposite inferences, and a conclusion either way would not shock the sense of a reasonable man, then the case is for the jury, although the judge may entertain a clear and decided conviction that the truth is on this or that side of the controversy." It is difficult in many cases to distinguish between the province of the court and the province of the jury, but the judicial mind cannot

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be put in the place of the mind and conscience of the juror without disturbing the line which should separate the two and creating endless confusion. The opinion of one person, however learned, cannot be substituted for the unanimous concurrence of twelve; and in this case the question the trial judge had to decide was not whether if he had been on the jury he would have found that there was negligence of the defendant and no negligence of the person killed, but whether there was evidence from which a jury might reasonably so find. If, as the appellant claimed by his motion for a nonsuit, and his exceptions and by this appeal, there was no dispute about the facts, was there not ground for dispute as to the proper inferences to be drawn from them? The learned judge held that there was, and the only question before us is whether he decided rightly. The appellant asserts there was no such evidence, that there was no dispute about the facts nor any weighing of conflicting testimony, but an entire lack of evidence upon the affirmative of the issue. If he is right, then the plaintiff's case rested on averments only, and not only the trial court, but the Special Term and the judges of the General Term are in error, for all agreed that the case called for something more than an opinion of the court upon a mere matter of law arising upon facts not disputed.

The facts as disclosed in evidence were as follows: The defendant's road runs through the village of Hornellsville in a south-easterly and north-westerly direction, and in so doing, crosses with six tracks at an acute angle the most traveled street in Hornellsville, known as Canisteo street. About noon on the day in question the decedent was north of the railroad and on the west side of Canisteo street at Houck's coal yard, and with Phelps left that place carrying between them a bushel basket full of coal for delivery at Phelps' house, south of the railroad. They went in that direction along the west walk, the decedent being on the outside and having hold of the basket with his right hand, until both passed the northerly rail of the first track, and Phelps cleared the other but Wood-

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ward was run into by two loaded box cars and thrown down, the brake beam caught him and after going about thirty feet the cars lost their momentum, and when taken from under the wheel he was found to be badly injured and soon after died. Whether his death was caused by these injuries or was the natural result of the medical and surgical treatment he received, was one of the questions mooted by the defendant upon the trial. But it was submitted to the jury in a manner satisfactory to the defendant and the propriety of their verdict in that respect is not now questioned. Whether the injuries were caused by the negligence of the defendant and whether the decedent exposed himself to danger voluntarily are the only subjects of inquiry.

First. Was the defendant negligent? Upon this inquiry very few words will answer. From a point about 250 feet west of the street crossing and to a point east of it the grade of the railroad is descending. The yardmaster controlled an engine and by it so impelled the cars in question that when detached they had acquired such momentum as carried them rapidly down the descending grade. "The velocity," says the defendant's witness, "depends on the push from the engine. The purpose is to send the cars across the switch to the yard." So it was this morning. The yardmaster, who superintended the operation, said, "We could keep the engine attached and have control of the train," but they did not; and, continues the same witness, "We were clearing the switch. We would couple together from the west end and then pull up, throwing the loaded cars back in on the switch. We were doing this that morning; the engine was standing 250 or 300 feet from the westerly line of the street; I was standing at the lever to move the rail to let the cars run on the switch; that point is about 150 feet west of Canisteo street; I think two or three cars struck Woodard." As there was no engine attached to these cars so "pushed" or "kicked" forward, so there was no person in charge of them, nor any method to control or stop them; nor was there notice of any kind by bell, or whistle, or flagman of their approach. They

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were simply stored with energy and put in motion by the locomotive and let go, to stop only when the power was exhausted, or some impediment, whether dead matter, or, as in this case, a living body came in their way. Not only does the evidence show the general use of the street at this place, but that at the very time of the accident there were several persons upon it, and many tracks in use by trains running or stationary. Yet upon the oath of an officer of the defendant it was made an issue by its pleadings whether such a crossing of the street by the railroad was a dangerous crossing, and whether in respect to it there was default or negligence on the part of its servants or agents. As to the first there can be no question, and in the omission of the defendant to adopt some precautionary measures to lessen the danger to which a wayfarer was exposed, a court or jury would be of little use if they failed to find corporate culpability, or in view of the statute requiring signals from the locomotive at the crossing of a public road, to find that the deceased came to his death by the direct negligence of the railway company. The statute (Laws of 1885, chap. 140, § 39), imposed upon this defendant the absolute duty of placing a bell upon the locomotive, whose agency caused the injury, of ringing that bell at a distance of at least eighty rods from the street crossing and continuously ringing it until it should have crossed the street; and for failure to do so subjected it not only to a penalty, but to a liability for all damages which should "be sustained by any person by reason of such neglect." It would be a mere evasion to say that the duty could be avoided by detaching the engine while allowing the cars to run by power already communicated by it. Great as are the privileges of the defendant, it has no right to carry on its business in such a manner as is likely to injure others. That it did so on this occasion is legally and morally certain. A similar act has been characterized by this court as one of "gross and criminal negligence." (*Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 597.) The first branch of the plaintiff's case therefore, was established in the most conclusive manner, and although the defendant, as we have seen, went into evidence,

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there was no pretence of the slightest caution in its conduct of the affair or of any exigency which compelled its omission. As the case stands, the death of the intestate can hardly be regarded as accidental, but the inevitable and natural result of the defendant's methods of business. Can we with like assurance hold there was not evidence upon which the triors of fact could fairly say the deceased exercised that ordinary care and prudence which the law required from him under the conditions and circumstances in which he was placed. We have nothing from his mouth. We know of him, however, that he was in the prime of life, that he had a wife and three children with whom he lived and for whom he cared; that he was steady, sober and industrious, serving in the same employment for twelve years and losing no day until this injury, and while neither these conditions nor the character of the man which they imply can take the place of that evidence of the exercise of due care which the law requires from one going into a place of peril, they were for the consideration of the jury and do add to the weight of testimony relating to his conduct and tending to show that he did not bring the misfortune upon himself. What was his conduct? From the coal yard whence he started he could plainly see so much of the railway as intersected the street; he could see east of the street, but no further to the west than the west side of the sidewalk. So was it until he reached the south side of Crotty's store, thirty-one and a half feet from the place where he was struck. At that point, by directing his eyes upon a line exactly at right angles with the store, he could take in fifty-seven feet more. But there was then in view and directly in his way the six tracks of the defendant. The first and second tracks, so far as could be seen, were unoccupied; on the third track a number of empty coal dumps or cars were moving from the west, and a long freight train or "train of box cars" drawing out "under pretty good motion" going west at the rate of five or six miles an hour, or, as one witness thinks, fifteen miles an hour, was on the fourth track, making the usual noise of a train in motion; its bell also was ringing.

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All such things tend to attract the attention of a wayfarer, and the decedent, whose way the trains obstructed, might lawfully, as he would naturally, turn his thoughts to them. He was, of course, bound as he approached the defendant's premises to observe every precaution, to avoid danger, which the law requires of a traveler at a railroad crossing. As to this the law is not unreasonable. I am not aware of any rule which exacts from one approaching a crossing, more than the exercise of ordinary prudence, nor of any exposition of that rule, which reduces to a formula his way of procedure.

The cases which call for its interpretation come before the courts with painful reiteration, but the answer is uniformly the same. Those cited by the learned counsel for the appellant form no exception. To recite them in detail would be useless, for the reason on which they turn is apparent upon the slightest inspection, and if there is a seeming conflict it is because of the peculiar facts of the particular case, and not because there has been any departure from the principle which lies at the bottom of the rule above stated. All that the law requires is a reasonable use of the senses.

According to the testimony the intestate and his companion did not approach the railroad without looking and listening. As already suggested, they could see nothing west of the crossing until they came within a short distance of the rail; by turning half-way around they could command fifty-seven feet; as they proceeded and came within ten feet they could see further. They did look. Phelps says: "As we approached the railroad I cast my eyes up as far as I could to the right to see by the Crotty block, and I saw nothing only the train going west." Asked: "Were there any engines anywhere around?" he says: "As I cast my eyes up the track by the corner, we went along, and I was watching the trains on the third and fourth tracks." As they got on the first track the cars ran down upon them. Asked by defendant's counsel: "You were listening to the trains that were going to the west as you approached the track?" Answer: "One of them was going west and the dumps were going east." Q.

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"Were you listening to them?" A. "Yes, sir; and watching them." Asked if he noticed the bell on the west bound train, he says, "I did." Asked if he heard it, he says, "Yes." Asked: "You were not aware there was an engine up toward Taylor street '(this was west)' before you were struck. Answered: "No, sir." Asked: "You were not listening for any engine up that way?" Answered: "As I was approaching the track I cast my eyes up that way." Q. "Were you listening for any engine up that way?" A. "We were not expecting any engine or any cars from that way." Q. "Your attention was not directed to the fact that there were cars coming down on that track?" A. "If it had been, we shouldn't have gone on the track. We had no warning of it; I did not hear the cars coming down." Q. "When you got past Crotty's building did you look up to see whether there was an engine or train coming?" A. Yes, sir. Q. Was that as soon as you got by his building? A. It was between there and the track. Q. Can you tell where it was? A. I had probably got half-way down." Q. "You looked up and didn't see anything and then you began to look at the other trains to see when they got across so you could pass?" A. "Yes, sir." Q. "Your attention was diverted by these trains until you were struck?" A. "Yes." Q. "You had got pretty near across the track when you were struck?" A. "Yes, sir." Q. "You were thrown between the tracks and Woodard, about the center of the track?" A. "It appears about that way." Q. "As you looked these two cars were not in view?" A. "No, sir."

The Crotty store came up to within six feet of the north or first track, and until he passed that point he could see only fifty-seven feet of the track west. Snyder was on Loder street, north of the railroad, opposite Crotty's block, the street intersecting Canisteo street; he was on the corner; he saw the men and the box cars overtake them; he was facing west, wanting to cross, but waiting for the west bound train to pass. Bennett was on the south side of the railroad and on the east side of Canisteo street; he also was waiting for the west bound

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train to pass, that he might cross; he saw Woodard and Phelps and says, "As they approached the track there was a freight train coming up under pretty good motion and they looked across and there were some coal dumps." "Q. Before they were struck by the car did you see whether they looked around or not? A. When they approached near the track they cast their eyes over as I should judge from the appearance of the men turning their heads and eyes. Q. Which way? A. Both directions. Q. Which directions? A. East and west." Asked by defendant's counsel: "Was it before or after the west bound train had passed Canisteo street that you saw Phelps and Woodard looking up and down?" Answer: "It was before." Asked: "When you saw these gentlemen looking round they were pretty near the door of Crotty's store, about opposite?" Answered: "When they were looking at the cars they were down pretty near the track, past the corner of the building." The cross-examination was protracted, testing with much detail the memory, steadfastness and observation of the witness, and conducted after the Socratic method, with questions leading to the desired result, but closing as follows: "Q. You were looking out for that west bound train when you came up? A. No, sir, I was watching the switch engine; as they cut the cars loose I saw them and this train came up. Q. And you saw these gentlemen looking around? A. Yes, sir. Q. Did you see both their heads turn? A. I think I did. Q. Do you know that they looked up at all? A. All I judge from was from the motion of their heads and the appearance of the men; Morhess was standing on the east side of Canisteo street and the north side of Loder street; saw Phelps and Woodard going towards the railroad." "They seemed," he says, "to halt when they got to first track; then they moved on." When he first saw the box cars "they were coming in right from behind Crotty's building; they were going without much noise; they were running quite fast." There was no man on the train, no one to stop it, and no flagman. He thinks "Woodard looked to the right" (the west), but "is not clear." On cross-exam-

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ination he could not say whether both looked to the right or not. Cook, a policeman on duty about three rods from the men, saw them approaching, saw the moving dump cars, the moving box cars, and the train going to the west. "As they stepped on the track they seemed to be observing the trains moving in front of them." "I saw them," he says, "moving across the track; they had nearly left the track when it (the box car) struck them." It struck Phelps first, then Woodard; knocked Woodard in front of and under the cars and "out of my vision." The ground, he says, "was frozen and covered with snow." The box cars "were very quiet, they were running very still." The cars were running with such velocity that Woodard's body was moved by them "thirty or forty feet." The train going west was making considerable noise, the rattling of the cars and the puffing of the engine. The dumps also were making more noise than the box cars and there were more dumps than box cars. This witness also proved that the company had been in the habit of having "a flagman there all day;" at this time, however, the flagman was not there. This was well proven: That the flagman theretofore stationed at that point on the north side of the crossing was then absent, and on the other side of the six tracks, himself entirely out of sight from the north crossing; nor could he himself see anything of the accident. So he testifies. For any useful or available purpose he might have been altogether absent. So far as persons coming from the north were concerned, he was off duty or withdrawn.

All these circumstances are to be considered in determining whether Woodard by any omission on his part contributed to the injury. He was familiar with the crossing and charged with knowledge that the defendant had been—I use the language of one of the witnesses—"in the habit of having a flagman there all day." The track had, indeed, been often used for switching, but there is no evidence that ever before cars had been shunted, or kicked, or pushed or discharged down what the defendant's witness styles "a grade heavily descending east," in the absence of the flagman, nor but that on

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every other occasion he was there to ward off the danger which might reasonably be anticipated by any intelligent person as likely to occur from such conduct on the defendant's part. His absence on this occasion was notice that nothing of the kind was to be attempted, and a wayfarer familiar with the conditions theretofore observed by the defendant in the use of the crossing, might naturally conclude that no use of the south track was then intended, nor any car about to pass, but if danger lay in one direction, equal danger must be apprehended in the other. Then there were the two moving trains, either of which threatened danger and served to attract the attention of the intestate. And we have the fact sworn to by more than one witness that he did look and observe and was alert in the use of his senses. Nothing more does the law require from one intending or about to enter upon a place of danger. Was it negligence not to have seen the car by which he was hit, in time to have stopped? It not only gave him no warning of danger, but the flagman usually in attendance, and whose known duty it was to guard the crossing and furnish notice to the traveler at this most dangerous place — dangerous only by reason of such act of the defendant as is now complained of — was absent, and this absence was an affirmative assurance of safety. On the third track there was the train of coal or dump cars coming from the west, and from the east the long train with its locomotive, making the usual noise, while from the first track there was nothing to be heard, nor any notice of approaching danger. The sense of hearing and the sense of sight might naturally be diverted to the objects before him, and his watchfulness affected by reliance upon the discharge by the company of its duty to run its trains over the crossing with the usual signal and under the observation of a flagman.

It may be presumed that on other and previous occasions care had been taken, and that this care was known to the decedent, so that as he may be chargeable with notice that the switch was used by the defendant, it was notice that the use was under safeguards and precautions upon the continued

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use of which he had a right to rely. Not only the evidence to which I have referred established that the decedent looked before entering upon the track, but the argument of the appellant's counsel concedes it. He claims only that he did not look at the right time — "did not look after he could have had an unobstructed view of the cars," that is while passing over a space of ten feet. This was a question for the jury. The time and manner of observation at a place of danger, on the part of a prudent and careful man, would be regulated not alone by the circumstances in which he found himself, but as that danger would depend upon the action of the defendant, his conduct would also be directed in the light of the experience he had of that action on similar occasions, and it should not be permitted to have an advantage of an omission on his part which its change of conduct produced.

The elaborate briefs of counsel on this appeal seem to show little uniformity in the decisions of courts upon the questions here involved. It is not likely that there will be, for facts vary and inferences which are natural in one instance would appear to be unreasonable in another. Yet one rule of action runs through them all — precautions by a corporation where circumstances make a street crossing a place of danger, and ordinary care on the part of a wayfarer lest he encounter it. Here on the part of the defendant there was literally no precaution, but an absolute and unexplained indifference to the life and safety of the citizen. On his part there was at least an apprehension of danger and attention to his conduct in respect to it. Whether it was sufficient could be determined only by the jury. The specific proposition submitted to the trial judge shows upon what a narrow point the defendant sought to take it from them. The motion for a nonsuit was on the broad and general ground that the "proof did not show that the deceased was free from contributory negligence." The request subsequently made assumes that the proof showed that while passing over "ten feet" to the tracks the approaching cars could be seen; "that as he then had opportunity to see them he was bound to do so." In other words, the claim

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is that "the law assumes not only that he did see them, but saw them in time to save himself, and as he did not save himself, his death was the result of his own want of care, and so not the result of the defendant's negligence." The proposition is not sound. It excludes most of the circumstances which make such a crossing dangerous, and the presence of which demand the attention of a prudent person. It excludes the conduct of the defendant and the condition of things caused by it. It disregards rules well settled in this State in regard to the relative duties of a traveler and a railroad company. The crossing was dangerous only when the defendant made it so by propelling its cars across the street. It was permitted to do so upon giving certain statutory signals. It not only omits to give those signals at its peril, but the omission of those or other customary signals is regarded as an assurance by the company to the traveler that no engine is approaching from either side within eighty rods of the crossing, and he may rely upon such assurance without incurring the imputation of negligence or breach of duty to a wrong-doer.

A defendant, say the court in *Ernst v. H. R. R. Co.* (35 N. Y. 1), "cannot impute a want of vigilance to one injured by his act or negligence, if that very want of vigilance were the consequence of an omission of duty on the part of the defendant." The jury might well find in words formulated in the case cited (*supra*) that the direct tendency of these omissions was to put the intestate off his guard, to disarm his vigilance and to produce a false sense of security. It may, indeed, be that notwithstanding the omission of these signals and the absence of the flagman, he might, by greater vigilance, have discovered the approach of the cars, if he had foreseen a violation of the statute or the withdrawal of the customary guard; and whether in failing to do so he failed in the observance of such a degree of care and diligence as men of ordinary prudence under similar circumstances usually employ, was a question for the jury. He did look and listen. He did not go upon the track heedlessly. There were circumstances calculated to divert

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his attention from the first track, from which no danger was to be expected, to others which he had yet to cross, and it was impossible to say, as matter of law, that he should have looked from some other point or in some other direction. Nor can it be said, as matter of law, that if he had looked at that other time, or from that other point, he could have seen the moving cars in time to escape. The law only declares that such a wayfarer must use his eyes and ears, in view of all the facts and circumstances of the case, as men of ordinary prudence placed in a similar situation would do, and the trial court did not err in submitting the case to the jury and leaving to them a consideration of all the facts likely to influence his conduct and so determine whether they were such as demanded his attention or such as distracted it. In *Ernst v. Hudson River Railroad Company* (*supra*) these questions are discussed with great fullness and similar conclusions reached. They have been repeatedly applied by us to other cases referred to by the respondent's counsel, and they need not be cited here.

But the general propositions which the appellant makes are both answered by the more recent case of *Glushing v Sharp, Receiver, etc.*, (96 N. Y. 676), where in an action for injury at a crossing, the omission of signals and the action of the gate-keeper were held conclusive as to the negligence of the defendant, and the court say: "The evidence shows that no bell was rung or whistle blown and that the gate was raised, and thus the carelessness of the defendant was established. But the claim of the defendant is that the plaintiff should have been nonsuited on account of his own carelessness, and this claim he bases upon these facts: That at the place where the plaintiff looked, about thirty feet from the railroad track, his view was somewhat obstructed and that he did not look again while passing the thirty feet, although during that space his view was unobstructed and he could have seen the train if he had looked. We think the case as to plaintiff's negligence was properly submitted to the jury. He looked both ways, and whether, under all the cir-

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cumstances, he should have looked again or continued to look, was for the jury to determine. The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and was properly to be considered by the jury with all the other circumstances of the case." These remarks have precise application here; the absence of the flagman, the absence of any signal, were assurances persuasive in like manner as the acts and omissions referred to in the case cited.

So it was decided in the *Greany Case* (101 N. Y. 419, 420), following the *Glushing Case*, and in *Sherry v. New York Central and Hudson River Railroad Company* (104 N. Y. 652). In view of these decisions and the general and well settled rules of law which these cases only reproduce and illustrate, the trial judge committed no error in refusing to take the case from the jury and submitting it as he did under proper directions to them. Another tribunal, whose duty it also was to examine the facts as well as the law, has affirmed the decision made by the trial court.

I find no ground on which the judgment of these courts should be reversed. It should, I think, be affirmed.

RAPALLO, EARL and PECKHAM, JJ., concur with FINCH J.;
RUGER, Ch. J., and ANDREWS, J., concur with DANFORTH, J.
Judgment reversed.

MARY J. PARKER et al., Administrators, etc., Respondents,
v. THE BOARD OF SUPERVISORS OF SARATOGA COUNTY,
Appellant.

Under the provisions of the acts of 1864 and 1865 (Chaps. 8 and 72, Laws of 1864; Chap. 41, Laws of 1865), conferring upon boards of supervisors power to borrow money on the credit of their respective counties to pay bounties, etc., and to execute obligations for its payment, the power so conferred was not intended to be limited to a single exercise thereof, but said board was authorized to borrow money and to renew the county obligations from time to time for the purpose of paying or continuing the indebtedness created under said acts.

It seems that boards of supervisors have no inherent power to borrow money or to issue negotiable paper, but must find the authority therefor in some statute, given either expressly or by implication.

In November, 1866, the board of supervisors of S. county passed resolutions providing for raising, by taxation, a certain amount of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." The debt so provided for, termed the town bounty debt, at that time amounted to over \$500,000, represented by a large number of separate obligations, a large portion of which matured in February thereafter. No other provision was made for the payment of the maturing obligations. Similar resolutions were passed at each annual session of the board down to 1875. *Held*, that the authority given was to be construed in reference to the circumstances, and was not limited to an extension of the then outstanding obligations, but authorized the county treasurer to borrow money to pay them as they matured, and to issue new obligations in renewal of those then existing or for the new loans.

In each year from 1865 to 1875, the accounts of the treasurer, which, with the vouchers accompanying them, showed that he had made new loans and issued new obligations, were audited without objection by a committee of the board. *Held*, the inference was irresistible that the board was cognizant of the facts, and its acquiescence in the assumption of power by the treasurer to borrow money and give new obligations as a means of extending the debt, was cogent evidence that the authority intended to be conferred included these transactions.

It seems any authority given to a county by the legislature to extend its indebtedness, includes the power to do it by borrowing money and substituting new obligations in place of the old ones.

The town bounty debt, so called, was incurred in pursuance of a resolution of the board of supervisors authorizing the borrowing of money on the credit of the county, to be disbursed for bounties on the order

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119	394
106	392
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of the supervisors of the respective towns. The amount so drawn by each supervisor it was declared should constitute a debt of his town payable by taxation of its property. There was no vote of the electors of the town authorizing the debt as prescribed by the act of 1864 (§ 22, Chap. 72, Laws of 1864). *Held*, that the debt was legally a debt of the county, not of the several towns; but that the authority of the treasurer extended to it, and it was immaterial that it was not described in the resolution with legal accuracy.

In an action upon notes issued by the county treasurer to P., plaintiff's intestate, for moneys loaned, ostensibly to pay maturing obligations of the county, in pursuance of said resolutions of the board of supervisors and in renewal of notes so given, it appeared that there was a fraudulent over-issue of notes by the county treasurer to a large amount; that notes were outstanding at the time of the annual meeting of the board of supervisors in 1874 to the amount of \$138,631, while if the money raised by taxation had been honestly applied and he had borrowed only sufficient to extend the portion of the debt he was directed to have extended, the whole debt would have been but \$20,801. It did not appear that the treasurer misapplied any of the moneys for which the notes in suit were given, and at no time did the indebtedness the treasurer was authorized to extend fall short of the loans made by P., and the good faith of the lender was not questioned. *Held*, that the evidence failed to establish a defense to the notes; that as the authority given to the treasurer authorized transactions and dealings in form of the same precise character as those which took place between the treasurer and the payee of the notes, the presumption was that they were authorized; and if, in fact, they were not within the actual limits of the power, the burden was upon defendant to show it.

It is immaterial in this regard whether the agency is a general one or confined to a particular series of transactions for the principal.

It was shown that in some years renewal notes were given to P. after the treasurer had renewed notes held by other parties exceeding in amount the debt which the board of supervisors had requested him to extend. *Held*, that this did not make out the defense; that there was as much reason for considering those other notes to be representatives of unauthorized loans, as there was for regarding as of that character the notes surrendered by P. on receiving the new notes.

It was claimed that the resolutions of the board were invalid, because they assumed to delegate to the treasurer the judicial and legislative power of the board to determine the extent and amount of the liabilities of the county and to audit and allow the same. *Held*, untenable; as the authority was to extend a debt already existing, not to create a new debt, or to pass upon or allow a disputed or doubtful claim.

Also, *held*, that it was not necessary to present the claim to the board of supervisors for audit.

Statement of case.

Whenever the act of an agent is apparently authorized by the terms of his power, and is not, so far as a third person dealing with the agent can know, in excess of his authority, the act is presumptively within the authority, and the burden of proving that it was done after the authority was spent rests upon the principal. The burden is not met or the presumption overthrown by proof that in the course of the agent's dealings he fraudulently exceeded his authority; it must be shown that the particular transaction was unauthorized.

Bonds and notes of a county, issued for loans authorized by law, are not open accounts for county charges which must be presented to the board of supervisors for audit.

As to whether the county could be charged in case it had been affirmatively shown that the notes in question were fraudulently issued by the treasurer in excess of his authority, *quære*.

Whether the rule that the principal may be bound by a false representation by an agent of the existence of an extrinsic fact peculiarly within the agent's knowledge, upon the existence of which his power depends, applies to public agents, *quære*.

(Argued June 10, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the 4th Tuesday of January, 1885, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury.

This action was brought upon certain notes issued to Hiram Parker, plaintiff's intestate, by Henry A. Mann, as treasurer of the county of Saratoga, of one of which notes the following is a copy:

"No. 8.

"SARATOGA COUNTY TREASURER'S OFFICE, }
"BALLSTON SPA, February 15, 1875. }

"In pursuance of a resolution, passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay, at the Saratoga county treasurer's office, on the 15th day of February, 1876, Hiram Parker, or bearer, six thousand dollars, at 7 per cent interest, for value received.

"\$6,000.

"HENRY A. MANN,
"Treasurer."

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The other note was similar, save in amount. They were given in part for cash borrowed by the county treasurer at the time and in part to take up other notes of similar form and character which matured at the date of said notes.

The further material facts are stated in the opinion

Charles S. Lesier for appellant. A county is a local organization created by the State for the purposes of civil administration, and has no corporate powers except such as are specially conferred by statute. (19 J. R., 259; *Board of Supervisors v. Ellis*, 59 N. Y. 624; *Dillon on Municipal Corporations*, § 10; *People ex rel. Hadley v. Albany Co.*, 28 How. Pr. Rep. 22; approved, 78 N. Y. 622; *People v. Lawrence*, 6 Hill, 254.) Chapter 8 of the Laws of 1864 was a re-enactment in part, and a supplementary amendment of chapter 15 of the Laws of 1863, and took the place of it. It contains a comprehensive plan providing for past liabilities and future loans and is, therefore, an implied repeal of all former laws on the same subject. (Potter's Dwaris, 156; *Dash v. Van Kleeck*, 7 John. 497.) The scheme of the board of supervisors, in assuming to create bounty debts owing by the individual towns, was void in not having been authorized by the bounty acts or by any statute, and therefore did not create a debt owing by any individual town. (*Magee v. Cutler*, 43 Barb. 239; *Faulkner v. Metcalf*, id. 255; *People v. Livingston Co.*, id. 298; 34 N. Y. 516.) The statements of the treasurer to the effect that the limit of the obligations had not been exceeded would be no more binding on the corporation than would the act of the officer in the issue. (*Supervisors v. Seabury*, 11 Abb. [N. C.], 466.) Even a *bona fide* holder is bound to prove affirmatively that all the conditions exist necessary to authorize the creation of a liability against a municipality and the municipality is not bound by the representations of its officers upon the face of the obligations. The burden of proving these facts rests upon the party seeking to enforce the obligations. (*Craig v. Town of Andes*, 93 N. Y. 405; *Starin v. Town of Genoa*, 22 id. 439;

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Town of Venice v. Woodruff, 62 id. 462, 465; *Dodge v. County of Platte*, 82 id. 218; *People v. Mead*, 36 id. 224; *Gelpecke v. City of Dubuque*, 1 Wall. 203; *Cagwin v. Town of Hancock*, 84 N. Y. 532; *Town of Lyons v. Chamberlain*, 89 id. 586; *Moore v. Mayor, etc.*, 73 id. 238; *McDonald v. Mayor, etc.*, 68 id. 23; *Donovan v. Mayor, etc.*, 33 id. 291; *Smith v. City of Newburgh*, 77 id. 130; *Peck v. Burr*, 10 id. 294; *People v. Cartwright*, 9 Hun, 159; *Matter of Manhattan R. R. Co.*, 5 Eastern Rep. 90; Dillon on Municipal Corporations [3d ed.], § 445; Story on Agency [9th ed.], § 307; *Parr v. Village of Greenbush*, 72 N. Y. 463; *McDonald v. Mayor, etc.*, 68 id. 23; *Brady v. City of New York*, 20 id. 312; *Donovan v. City of New York*, 33 id. 291; *Lee v. Munroe*, 7 Cranch, 366, 368; *The Floyd Acceptances*, 7 Wal. 666, 680; *Whiteside v. United States*, 98 U. S. 257; *Board of Supervisors v. Ellis*, 59 N. Y. 625.) Where a municipal corporation authorizes an officer to issue obligations to a definite amount, and such officer issues obligations to a larger amount, the excess is void, even in the hands of *bona fide* holders, for value. (*Savings Bank v. Winchester*, 8 Allen, 109; cited with approval, 68 N. Y. 27; *Mussey v. Beecher*, 3 Cushing, 511; *Supervisors of Rensselaer County v. Bates*, 17 N. Y. 242; *Hart v. Bulkley*, 2 Edw. Ch. Rep. 70; *People v. City Bank of Rochester*, 93 N. Y. 582; *Gray v. Supervisors*, 26 Hun, 265; *Aetna N. Bank v. Fourth N. Bank*, 46 N. Y. 82; *Everson v. City of Syracuse*, 100 id. 577; *Briggs v. Central N. Bank*, 89 id. 182; *People v. Merchants & M. Bank*, 78 id. 269; *Marsh v. Oneida Central Bank*, 34 Barb. 298; *Commercial Bank v. Hughes*, 17 Wend. 94.) As plaintiff knew he was dealing with special agents he was bound to know the extent of their authority. (*Delafield v. State of Illinois*, 2 Hill, 174; *James v. Hackley*, 16 John. Rep. 273; *Beach v. Endress*, 51 Barb. 570; *Muldon v. Whitlock*, 1 Cowen, 308; *Reed v. Whyte*, 5 Esp. 122; *Cheever v. Smith*, 15 John. 276; *Davis v. Allen*, 3 Comst. 170; *Chemung Canal Bank v. Supervisors of Chemung Co.*, 5 Denio, 517.) Even if chapter 8 of

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1864 authorized counties to borrow money they could only contract in the mode pointed out by that statute. (Dillon on Municipal Corporations, § 373; *Head v. Providence Ins. Co.*, 2 Cranch, 127; *Parr v. Village of Greenbush*, 72 N. Y. 463, 472.) The county had no power or authority to borrow money, or to issue paper similar to that set out in the indictment. (*Supervisors v. Weed*, 35 Barb. 136, 142; *Chemung Bank v. Supervisors*, 5 Den. 517, 523; *People v. Mitchell*, 35 N. Y. 552; *Thompson v. Lee Co.*, 3 Wall. 330; *Marsh v. Fulton Co.*, 10 id. 676; *Police Jury v. Britton*, 15 id. 566, 570; *Van Alstyne v. Freday*, 41 N. Y. 174; *Barker v. Loomis*, 6 Hill, 463; *Mather v. Crawford*, 36 Barb. 564; *People v. Lawrence*, 6 Hill, 245; 15 Hun, 167.) Boards of supervisors and the county treasurer being public officers of limited powers cannot by any neglect, omission of duty, unfaithfulness or malfeasance impair the rights of, or extend the liability of the county. (*Supervisors of Monroe v. Otis*, 62 N. Y. 88; *Looney v. Hughes*, 26 id. 514-519; Dillon on Municipal Corporations, § 772; *Mayor of New York v. Bailey*, 2 Denio, 448; *United States v. Kirkpatrick*, 9 Wheaton, 735; *Dox v. The Postmaster-General*, 1 Peters, 325; *United States v. Nicholl*, 12 Wheat. 505; *Jones v. United States*, 18 Wallace, 662; *People v. Russell*, 4 Wend. 570; *United States v. Van Zandt*, 11 Wheat. 184; *Hamilton County v. Mighels*, 7 Ohio, 109; *De Grauw v. Supervisors*, 13 Hun, 381; *Ham v. City of New York*, 70 N. Y. 459; *Tone v. Mayor, etc.*, id. 157.) After January 1, 1880, interest could only be allowed at the rate of six per cent. (*Sanders v. Lake Shore & Mich. S. R. R.*, 94 N. Y. 641; *O'Brien v. Young*, 95 id. 428.)

A. Pond for appellant. There being no valid town debt for bounty purposes the board of supervisors had no power under the bounty acts, or either of them, to pass any resolution empowering the county treasurer, or anybody else, either to extend or pay them. (Dillon on Municipal Corporations, §§ 421, 354; *Matter of Second Ave.* 66 N. Y. 395, 398;

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Ashley's Appeal, 4 Pick. 21; *State Chamberlain v. Mayor, etc.*, 38 N. J. [Law], 110, 113; *People v. Otis*, 90 N. Y. 48, 53; *People v. Ames*, 19 How. 551, 557; *People v. Supervisors of Schenectady*, 35 Barb. 408, 418; *People v. Stocking*, 50 id. 573, 581; *Western R. R. Co. v. Bayne*, 11 Hun, 166; *Hall v. Lauderdale*, 46 N. Y. 70; *Edwards v. Watertown*, 24 Hun, 426.) The law, as well as public policy, absolutely forbids that the board of supervisors should abdicate its own legislative and judicial power and functions in respect to any class of claims presented against the county for audit and allowance, and delegate the same to an agent like Mann to perform. (*People v. Livingston County*, 26 Barb. 118; *People v. Stocking*, 50 id. 573; *People v. Supervisors*, 67 N. Y. 109; *Supervisors v. Wandall*, 6 Lans. 33, 38; S. C. affirmed, 59 N. Y. 645; 1 Dillou on Mun. Corp. §§ 96, 97; *Birdsall v. Clark*, 73 N. Y. 73; *Lyon v. Jerome*, 26 Wend. 485; *Beltinger v. Gray*, 51 N. Y. 618; *Davis v. Reed*, 65 id. 566; *Merritt v. Portchester*, 29 Hun, 619; *People v. Supervisors*, 25 id. 131; *Board of Excise v. Sackrider*, 35 N. Y. 154; *Anderson v. Eq. Gas Light*, 19 Week. Dig. 471.) It is well settled that a public agent or the agent of a municipality cannot extend or add to his own authority by false representations in respect to its extent or its existence, and third persons, if they act upon such false representations of the agent, do so at their peril. (Story on Agency, §§ 307, 133; 1 Dillon on Mun. Cor. §§ 445, 447, n.; *Lee v. Munroe*, 7 Cranch, 366; *Board v. Ellis*, 59 N. Y. 625; *Board v. Bates*, 17 id. 242, 247; *Swift v. Williamsburgh*, 24 Barb. 427, 432; *Lowell Bank v. Winchester*, 8 Allen, 109; *Benoit v. Inh. of Conway*, 10 id. 528; *Baltimore v. Eshback*, 18 Md. 276; *Mayor, etc., v. Musgrove*, 48 id. 272; *Whiteside v. United States*, 93 U. S. 247, 257; *People v. The State*, 67 Ill. 435, 438; *Bouton v. Board*, 74 id. 384, 395; *Craig v. Andes*, 93 N. Y. 405; *Chapleo v. Brunswick Build. Soc.*, 29 Eng. (Moak) 781, 796.) The rule is the same as to a private special agent. He cannot extend his own authority and thereby bind his principal by his own false representations in respect

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thereto. (Story on Agency, § 133; *Gibson v. Colt*, 7 J. R. 390; *Mussey v. Beecher*, 3 Cush. 511; *Stollenwork v. Thatcher*, 115 Mass. 221, 227; *Bumpstead v. Hoadley*, 11 Hun, 487; *Griswold v. Perry*, 7 Lans. 98; *Marvin v. Wilbur*, 52 N. Y. 270; *Martin v. Farnsworth*, 49 id. 555.) The board of supervisors who made Mann its agent was not the county, but were merely other special agents of the county possessing but special and limited powers, and among those powers was not the power to confer on an agent, of their own appointment, greater power than they possessed themselves. (*Chemung Co. Bank v. Supervisors*, 5 Den. 517, 522; *Supervisors v. Weed*, 35 Barr. 136, 142; *People v. Mitchell*, 35 N. Y. 551; *Baker v. Loomis*, 6 Hill, 463; *Matter of Crawford*, 36 Barb. 564; *Van Alstyne v. Friday*, 41 N. Y. 174; 1 Rev. St. at Large, p. 337, § 2; *Morris & Essex R. R. Co. v. Sussex R. R. Co.*, 20 N. J. [Eq.] 542; 1 Dillon on Mun. Cor. §§ 445, 447, n; *Donovan v. Mayor, etc.*, 33 N. Y. 291, 293; *McDonald v. Mayor, etc.*, 68 id. 23; *Dickinson v. Poughkeepsie*, 75 id. 65, 74; *Parr v. Greenbush*, 72 id. 463, 472; *Smith v. Newburgh*, 77 id. 130, 136; *Weismer v. Douglass*, 64 id. 91, 105; *Craig v. Andes*, 93 id. 405; *Board of Supervisors v. Otis*, 62 id. 88; *Horton v. Thompson*, 71 id. 513, 525; *Kingsland v. Mayor, etc.*, 5 Daly, 418; *Alexander v. Cauldwell*, 83 N. Y. 480; *Davis v. Old Col. R. R. Co.*, 131 Mass. 258.) The county being a public corporation, could not be estopped, by the act of its agent, or officer or its board in excess of his and their authority. (*Supervisors v. Wandell*, 6 Lans. 33; affirmed, 59 N. Y. 645; *Ford v. Mayor, etc.*, 4 Hun, 587; affirmed, 63 N. Y. 640; *Supervisors v. Ellis*, 59 id. 620; *Supervisors v. Otis*, 62 id. 88, 92; *Weismer v. Douglass*, 64 id. 91; *Benoit v. Inh. of Conway*, 10 Allen, 528; *Lee v. Munroe*, 7 Cranch, 366; *People v. Brown*, 67 Ill. 425.) Mann's acts in making the notes constituted no representation at all that the facts existed necessary to the existence of the power in Mann to make them, so as to estop the defendant in this case from denying their existence, because, as the judge has found, the

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fact to be, there was then no town bounty debt owing by any town, to be extended. (*Horton v. Thompson*, 71 N. Y. 513, 523; *Dodge v. County of Platte*, 82 id. 218; *McClure v. Oxford*, 4 Otto, 429; *Barnes v. Lacon*, 84 Ill. 461; *People v. Board, etc.*, 34 N. Y. 516, 518; *People v. Board, etc.*, 34 id. 516; S. C. 43 Barb. 298, 302; *Faulkner v. Metcalf*, id. 255, note; *Magee v. Cutler*, id. 239, 254; 1 Dillon on Mun. Cor. § 421 [354]; *Matter of Second Av.* 66 N. Y. 395, 398; *People v. Otis*, 90 id. 48, 53; *State v. Chamberlain*, 38 N. J. [Law], 110, 113; *Joslyn v. Dow*, 19 Hun, 494, 497; 4 Pick. 21.) The annual resolutions of the supervisors did not authorize Mann to borrow any money on the credit of the county or to give any promissory notes binding on the county therefor, nor did they authorize him to borrow or extend after he had once extended or borrowed to the extent of the debts so desired to be extended. (*Bonnell v. Griswold*, 89 N. Y. 122, 127; *Schwinger v. Raymond*, 83 id. 192; *In re Second Av.* 66 id. 395, 398; *People ex rel. N. Y. & C. R. R. Co. v. Hutton*, 18 Hun, 116, 120; Paley on Agency, 202; 2 Kent's Com. 620; Story on Agency § 126; *Batty v. Carswell*, 2 J. R. 48; *Davenport v. Buckland*, Hill and Den. 75; *Mixon v. Palmer*, 4 Sel. 498; *Olyphant v. McNair*, 41 Barb. 446; *People v. Bostwick*, id. 9, 25; *Bush v. Cole*, 28 N. Y. 261, 269; *Scott v. McGrath*, 7 Barb. 53; *Cagwin v. Town of Hancock*, 84 N. Y. 532, 542; *Martin v. Farnsworth*, 49 id. 555, 558, 561; *Doubleday v. Kress*, 50 id. 410, 415; *Rossiter v. Rossiter*, 8 Wend. 494; Dunlap's Paley on Agency, 192; *Atwood v. Maning*, 7 B. & C. 278; *Ferrira v. Depew*, 17 How. 418; *Hackettstown v. Swackhamer*, 37 N. J. [Law], 194; *Bank of Indiana v. Buckbee*, 3 Keyes, 461; *Martin v. Peters*, 4 Rob. 434; *Hawtayne v. Bourne*, 7 Mees. and Wels. 595; *Supervisors v. Deyoe*, 77 N. Y. 221; *Horton v. Thompson* 71 N. Y. 513, 525; *Dodge v. County of Platte*, 82 id. 218; *Barnes v. Lacon*, 84 Ill. 461; *McClure v. Oxford*, 4 Otto, 429.) Mann had no authority to give any promissory note, binding on the county, to Parker, because the resolution con-

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ferred no express authority upon him to that effect or said anything upon that subject, and none such can be implied. (*Rossiter v. Rossiter*, 8 Wend. 494; *Lawrence v. Gebbard*, 41 Barb. 575; *Holtsinger v. Nat. Com. Ex. Bk.* 37 How. 203; *Robinson v. Chemical Bk.* 96 N. Y. 404, 407; *Paige v. Stone*, 10 Metc. 160; *Hazeltine v. Miller*, 44 Me. 177, 180; *N. Y. Iron Mines v. First Nat. Bk.*, 39 Mich. 644; *Spooner v. Thompson*, 48 Vt. 259, 264; *Hills v. Upton*, 24 La. Ann. 427; *Webber v. President of Williams College*, 23 Pick. 302; *Supervisors v. Deyoe*, 77 N. Y. 221; 1 Bouv. Inst. 310.) The opinion of Mann as to the character of the debt is wholly insufficient to warrant a judgment in favor of the plaintiff thereon against the county. (*People v. Greene*, 5 T. and C. 376.) The board of supervisors could be made liable for Mann's acts in doing only what the resolutions authorized, and not otherwise. (*Everson v. Syracuse*, 100 N. Y. 577; *Merritt v. Read*, 5 Denio, 352; *Van Rensselaer v. Kidd*, 2 Sel. 331; *Second Ave. R. R. Co. v. Mehrbach*, 17 J. & S. 267.) The supervisor did not represent the town, in respect to its war indebtedness, and this whole scheme, which Mann was appointed to carry out, was void. (*People v. Board, etc.*, 34 N. Y. 516; S. C. 43 Barb. 298, 302; *Faulkner v. Metcalf* id. 255, note; *Magee v. Cutler*, id. 239, 254.) Only six per cent was allowable since January, 1880, on contracts maturing before that time. (*Bennett v. Bates*, 94 N. Y. 354; *Sanders v. R. R. Co.*, id. 641; *O'Brien v. Young*, 95 id. 428.)

Lemuel B. Pike for respondents. The county of Saratoga had power to borrow money for the purposes of paying bounties, and the incidents of putting down the rebellion. (Laws of 1864, chap. 8, § 22; Laws of 1863, chap. 15, § 6.) Those statutes were made *pro bono publico*, and such a statute shall be construed in such manner that may, as far as possible, attain the end proposed, although it carries it to another subject not, by words, included in the act. (*Potter's Dwaris*, 231, 234; id. note 19, 202.) The statute must be construed with reference to its purposes and the ends sought. (*Weed v.*

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Tucker, 19 N. Y. 433; *Hendler v. Golden*, 36 id. 446) The power to renew or continue the indebtedness was complete. (*Potter's Dwaris*, 123, Max. vii.; *Williamsport v. Commonwealth*, 84 Penn. St. 487; *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370; *People v. Brennan*, 39 Barb. 523, 545; *Ketchum v. City of Buffalo*, 21 id. 294; *S. C.*, 14 N. Y. 356, 365; *Meech v. City of Buffalo*, 29 id. 198; *Tucker v. City of Raleigh*, 75 N. C. 267; *Hall v. Lauderdale*, 46 N. Y. 70; *Le Conteulx v. City of Buffalo*, 33 id. 333; *R. S.*, part 1, chap. 12, tit. 1, art. 1, § 2.) The authority given the agent, the treasurer, to extend, carried with it the power to do those acts necessary to the attainment of the purpose. (*Hall v. Lauderdale*, 46 N. Y. 73; *Story on Agency*, § 97; *Commercial Bank v. Norton*, 1 Hill, 504; *Williams v. Getty*, 31 Penn. St. 464; *Supervisors v. Seabury*, 11 Abb. [N. C.] 461; *Jagger Iron Co. v. Walker*, 76 N. Y. 521.) The conditions in fact existed upon which the treasurer was authorized to make the loan, to wit, request of the towns to have debts extended, and, in the absence of proof, the county having the power; and, so far as the county is concerned, every act being within its power, the legal presumption is that the condition existed, and that the obligations were made for a proper consideration, and the agent had the power to make them. (*Belmont v. Coleman*, 1 Bosw. 188; *Nelson v. Eaton*, 26 N. Y. 414, 415; *Farmers' Loan & Trust Co. v. Curtis*, 7 id. 466; *De Groff v. American Linen Thread Co.*, 21 id. 124; *Mutual Benefit Life Ins. Co. v. Davis*, 12 id. 569; *Farmers' Loan & Trust Co. v. Clowes*, 3 id. 470; *Partridge v. Badger*, 25 Barb. 146.) There is no difference between municipal and other corporations once the power established. (*Lee v. Village of Sandy Hill*, 40 N. Y. 442; *N. Y. & B. S. M. & L. Co. v. Brooklyn*, 71 id. 584.) The presumption is the officer did his duty. (*Jackson v. Marsh*, 6 Cow. 281.) The suggestion that the authority given was to extend a town bounty debt is fallacious. There was no town bounty debt as between the creditor and the county. It was a county debt. (*People v. Supervisors of Livingston*, 34 N. Y. 516, 522;

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Magee v. Cutler, 43 Barb. 253.) The objection that the power was judicial and, therefore, could not be exercised by the treasurer, is not well founded. The county could act only through such an agent, or the board of supervisors sitting in continual session, to pass upon every loan. (*People v. Supervisors of Livingston*, 34 N. Y. 516, 522; 43 id. 398; *Hall v. Lauderdale*, 46 id. 70; *Magee v. Cutler*, 43 Barb. 240; *Faulkner v. Metcalf*, id. 258n.; *People v. Supervisors of Columbia*, 43 N. Y. 130; *Moore v. Mayor, etc.*, 73 id. 239.) The county obligations were valid in whatever form they were given for this debt. (*People v. Supervisors of Livingston*, 34 N. Y. 522; 6 Week. Dig. 370; *People v. Mead*, 24 N. Y. 114; *Kelly v. McCormick*, 28 id. 318, 323; *Mott v. Hicks*, 1 Cow. 513; *Phelps v. Yates*, 16 Blatch. 192; 68 Maine, 160; 6 Otto, 312; *Town of Solon v. Williamsburgh Savings Bank*, 35 Hun, 1; *Gerwig v. Sitterly*, 56 N. Y. 214; *Oneida Bank v. Ontario Bank*, 21 id. 490; *People v. Brennan*, 39 Barb. 544; *Moss v. Averill*, 10 N. Y. 457; *Kelly v. Mayor, etc.*, 4 Hill, 263; *Williamsport v. Commonwealth*, 84 Penn. St. 487; *Ketchum v. City of Buffalo*, 14 N. Y. 375, 376; *Moss v. Oakley*, 2 Hill, 265; *Newman v. Supervisors*, 45 N. Y. 686-688; *Kelly v. Mayor, etc.*, 4 Hill, 263; *City of Galena v. Commonwealth*, 43 Ill. 423; *Ryan v. Lynch*, 68 id. 160.) The supervisors ratified every act of the treasurer prior to 1875, as to the manner of executing his agency. A municipal corporation can ratify an act it could originally authorize. (*City of Shawneetown v. Baker*, 85 Ill. 564; *Peterson v. Mayor, etc.*, 17 N. Y. 453; *People v. Flagg*, 17 id. 536; 40 Barb. 256; *Brady v. Mayor, etc.*, 1 Barb. 584; Story on Agency, §§ 244, 254, 255; *Hoyt v. Thompson*, 19 N. Y. 208; *Supervisors v. Senbury*, 11 Abb. [N. C.] 461; *Brown v. Mayor, etc.*, 63 N. Y. 244; *People v. Supervisors*, 68 id. 119.) The county having permitted the treasurer to transact its business in this manner, and having approved his acts, was an authority to him to continue the manner, and justified parties in dealing with him in that manner. (Story on Agency, §§ 89, 260; *Calhoun v. Delhi R. R. Co.*, 28 Hun, 379, 402.) The defend-

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ant is estopped from denying that the notes and bonds in suit are not valid; the apparent is the real authority of the agent. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Merchants' Bank v. Griswold*, 72 id. 472.) Where a power exists there is no difference between a corporation, municipal or otherwise, and an individual. (*Lee v. Sandy Hill*, 40 N. Y. 442, 447, 448; *N. Y. & B. S. M. & L. Co. v. Brooklyn*, 71 id. 584; *Calhoun v. Delhi R. R. Co.*, 28 Hun, 399; *People v. Ingersoll*, 58 N. Y. 28, 29.) A municipal corporation may be estopped. (*Gifford v. Town of White Plains*, 25 Hun, 606; *Curnen v. Mayor, etc.*, 79 N. Y. 511, 514, 515; *O'Leary v. Board of Education*, 93 id. 5; *Calhoun v. Delhi R. R. Co.*, 28 Hun, 399; *Davis v. Mayor, etc.*, 93 N. Y. 250; *Sharp v. Mayor*, 40 Barb. 256; *Moore v. Mayor, etc.*, 73 N. Y. 238, 246; *People v. Stephens*, 71 id. 560; *Gould v. Town of Oneonta*, 71 id. 298; *Town of Lyons v. Chamberlain*, 89 id. 586, 587; *People v. Mead*, 24 id. 114; *Neeley v. Yorkville*, 10 Rich; S. C. 152, 143; *Belo v. Commissioners of Forsyth Co.*, 76 N. C. Rep. 489; *De Voss v. City of Richmond*, 8 Gratt. 338; *County of Davies v. Hindekoper*, 19 Alb. Law Jour. 201; *Hackett v. City of Ottawa*, 19 id. 317; *City of Chicago v. Turner*, 80 Ill. 419; *Supervisors v. City of Lincoln*, 81 id. 156; *City of Cincinnati v. Cameron*, 33 Ohio, 336; *McPherson v. Foster*, 43 Iowa, 64; *Schunner v. Seymour*, 24 N. J. Eq. 155; *Kneeland v. Gilman*, 24 Wis. 42; *San Antonio v. Meheffy*, 6 Otto, 312; *Rogers v. Burlington*, 3 Wall. 654; *Deming v. Houghton*, 64 Me. 264; *Sternes v. Franklin*, 48 Mo. 167; *Alvord v. Syracuse Sav. Bank*, 98 N. Y. 600; *Bissell v. M. S. R. R. Co.*, 22 id. 258; *Newman's Case*, 45 id. 686; *Lee v. Village of Sandy Hill*, 40 N. Y. 447, 448.) A party dealing with a municipal corporation must see to it that the power exists, and there his duty ends. (*Belo v. Commissioners of Forsyth Co.*, 76 N. C. Rep. 489; 7 Otto, 272; *Orleans v. Platt*, 9 id. 682; *Com'rs v. Bolles*, 94 U. S. 104; *Dodge v. County of Platte*, 82 N. Y. 230; *Starin v. Town of Genoa*, 23 id. 463; *Town of Springport v. Teutonia Savings Bank*, 75 id. 406.) The treasurer, if he received enough from taxes

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to pay the indebtedness, must have misappropriated it. His misappropriation is chargeable to the county, and the county must raise the money again in some manner. (*Chemung Canal Bank v. Supervisors*, 5 Denio, 522, 523; *Bassett v. State of Ohio*, 26 Ohio R. 543; *People v. Comptroller*, 77 N. Y. 45; *Federgreen v. Town of Fallsburgh*, 25 Hun, 152; *Ketchum v. City of Buffalo*, 14 N. Y. 363-366; 87 id. 628; 98 Ill. 94.) The giving of the new obligations, if they were void, did not extinguish the debt. (43 N. Y. 159; 65 Barb. 303; 27 How. 111; 58 N. Y. 350; 46 id. 76; 5 Denio, 517; 13 Wend. 101; 11 id. 9; 15 Johns. 475; *Jagger Iron Co. v. Walker*, 76 N. Y. 521.) The notes in question, if they were void as obligations, were still valid to extend the debt, so far as to prevent the statute of limitations running under section 395, Code of Civil Procedure. (*In re Consalus*, 95 N. Y. 340; *City National Bank of Poughkeepsie v. Phelps*, 86 N. Y. 484; *Smith v. Ryan*, 66 id. 352; *Kelly v. Webber*, 27 Hun, 8; *Harper v. Fairley*, 53 N. Y. 442; *Shoemaker v. Benedict*, 11 id. 185; *People v. Ingersoll*, 58 id. 1; *Huff v. Knapp*, 5 id. 66, 67; *People v. Stout*, 23 Barb. 346; *People v. New York*, 5 Cow. 336.) The obligations in suit were such as need not have been presented to the board of supervisors, for audit. (1 R. S. [Bank's 6th ed.] 929, § 10; *Blake v. Supervisors*, 61 Barb. 149; *Chemung Bank v. Supervisors*, 5 Denio, 517; *Backer v. Supervisors*, 3 Week. Dig. 293; *Marsh v. Town of Little Valley*, 1 Hun, 554; *S. C.*, 64 N. Y. 112; *People v. Hawkins*, 46 id. 9; *Newman v. Supervisors*, 45 id. 686; *Bridges v. Supervisors*, 92 id. 570; *Hathaway v. Town of Homer*, 5 Lans. 267; *Federgreen v. Town of Fallsburgh*, 25 Hun, 152; *Hill v. Supervisors*, 12 N. Y. 52; *People v. Thompson*, 25 Barb. 73; *Brown v. Town of Canton*, 4 Lans. 409; approved, 64 N. Y. 115.) An action is the proper remedy; a *mandamus* will not lie because there is a proper legal remedy. (64 N. Y. 112; 46 id. 9; 61 Barb. 149; 2 Hill, 45; 92 N. Y. 580.) The bonds, notes and instruments being within the power of the county, even if improperly issued by the treasurer, were negotiable

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instruments, and in the hands of a *bona fide* transferee for value, are binding on the county. (*Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Brainard v. N. Y. & H. R. R. Co.*, 25 id. 495, 500; *Lindsley v. Diefendorf*, 43 How. 357; *People v. Mead*, 24 N. Y. 114; *Delafield v. Illinois*, 2 Hill, 159; 26 Wend. 191; *Blake v. Supervisors*, 61 Barb. 149; *Bissell v. M. S. R. R. Co.*, 22 N. Y. 290; 84 Penn. St. 487; 24 Am. R. 208; 13 Blatch. 424, 246; 12 id. 539; 12 Wheat. 70; 11 Otto, 494; 1 Wall. 83, 175, 384; 5 id. 784; 15 id. 358; 14 id. 252; 19 Alb. Law Jour. 201, 317.)

ANDREWS, J. The county of Saratoga after the close of the war and in November, 1865, was indebted in the sum of about \$618,000 for money borrowed on the credit of the county to pay bounties to volunteers, the expenses of their enlistment, and for the support of their families. The debt was represented by notes of the county, signed by Henry A. Mann, as county treasurer, and by unsealed instruments in the form of bonds, executed in behalf of the county by the chairman of the board of supervisors and by Mann as treasurer. It was divided into two classes, the county bounty debt (so-called), amounting to \$138,400, which had its origin in a resolution of the board of supervisors, passed in December, 1864, which provided for the payment of a county bounty to volunteers who should thereafter enlist in the military or naval service of the United States and be credited to any town of the county upon its quota, and the town county debt (so-called), amounting to about \$480,525, which was incurred in pursuance of a policy initiated by a resolution of the board, passed December 18, 1863, which authorized the borrowing of money on the credit of the county for the payment of bounties to volunteers, to be disbursed on the orders of the supervisors of the respective towns, and which also provided, in substance, that the amount drawn by the supervisors of the towns, respectively, should constitute a town debt of the town drawing the same, payable by taxation upon its property. This large debt confronted the

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board of supervisors at its annual meeting in November, 1865. Most of the money had been borrowed on short terms of credit and many of the obligations given therefor would fall due on the fifteenth of the succeeding February, and it was necessary to provide for their payment or for the extension of the debt. The so-called town bounty debt forming the bulk of the indebtedness, first received the consideration of the board, and on November twenty-second the board passed a resolution as follows: "*Resolved*, That the county treasurer be directed to procure an extension of the time of payment of such portion of the old county debt incurred prior to December, 1864, as the several towns owing the same may desire extended, and the expenses and interest upon the same be chargeable to the several towns, respectively, desiring such extension." On the twenty-fourth of November a resolution was passed directing that the sum of \$25,000 be levied on the county, to be applied on the principal and interest of the general county bounty debt, and that the treasurer procure an extension of the payment of the balance remaining due. At each subsequent annual session of the board, down to and including the year 1874, a resolution was passed in substance like the resolution of November 22, 1865, authorizing the treasurer to extend such part of the town bounty debt as the towns owing the same should desire. The plan thus adopted by the board in 1865, and continued to 1875, for the gradual payment and final extinguishment of the town bounty debt, was, as has been shown, to levy a part of the debt each year by tax upon the respective towns, and to extend the remainder, the manifest intention being that the amount levied in any year and the amount of the debt extended and unpaid in the same year, should together precisely equal the whole amount of the debt. In each year the board of supervisors levied on the respective towns a tax for the payment of a portion of the town bounty debt, and in each year, also, the respective supervisors requested the treasurer to extend the amount unpaid, not provided for in the levy of that year. In

respect to the county bounty debt a somewhat similar policy was pursued. In November, 1866, the board of supervisors authorized the treasurer to borrow on the credit of the county \$60,000, to apply thereon. The debt was then \$165,322.99, having been increased from the previous year. In 1867, the board passed a resolution that the county bounty debt be paid in six equal annual installments, the first payment to be made February 15, 1869, and authorizing the treasurer "to extend the time of payment of the present indebtedness and to borrow money on the credit of the county in cases where such indebtedness cannot be extended, in such sums and for such time as is necessary to carry out the provisions of this resolution." The treasurer assumed to exercise the authority to extend the debt under the annual resolutions of the board of supervisors, by borrowing money to pay maturing obligations and giving notes of the county therefor, signed by him as treasurer, and in other cases by giving new obligations to creditors, taking up the old notes or bonds. It was proved and is found that if the treasurer had honestly applied the money raised by taxation for the payment of the bounty debt, to that object, extending only the actual, valid indebtedness, the whole debt would have been paid before the meeting of the board of supervisors in the fall of 1874, excepting about the sum of \$20,800. The usual resolution for an extension was passed by the board of supervisors at the November session in that year. Mann was treasurer of the county from January 1, 1861, to December 31, 1875. It was ascertained soon after he left the office that notes of the county, signed by him as treasurer, being more than seventy-five in number and amounting in the aggregate to \$138,631, and issued between February 15, and August 5, 1875, were outstanding, making the apparent debt of the county \$118,000 greater than the actual debt, if the money raised had been honestly applied. In other words, there was a fraudulent over-issue by Mann of notes to the amount of \$118,000. Among those outstanding notes were two notes held by the plaintiffs' intestate, of \$6,000 and \$7,000, respectively, dated February

15, 1875, payable February 15, 1876. The consideration of those notes was money loaned by the plaintiff's intestate to Mann as treasurer, for the use of the county and for accrued interest on deferred payments. The loans were principally made in 1864, 1866, 1868 and 1869, and new notes were given on or about the fifteenth of February in each year until 1875, in renewal of the notes maturing at that date, and on taking the new notes the old notes were delivered by the intestate to Mann.

The general question relates to the liability of the county of Saratoga for the loans made by the intestate to Mann as treasurer. The *bona fides* of Parker, the intestate, is not questioned. The liability of the county for the loans made by Parker is challenged and denied in the first place, on the ground that the county had no legal capacity to borrow the money loaned by him, or to execute notes or obligations for its payment. It is not denied that authority was conferred upon the board of supervisors by the statutes, chapter 8 and chapter 72, of the Laws of 1864, and chapter 41 of the Laws of 1865, to borrow money on the credit of the county to pay bounties to volunteers and for other purposes mentioned in those statutes, and to execute obligations for its payment. The claim is that the power conferred by those statutes was exhausted when once exercised and that after the debt had been created, the statute did not authorize a new borrowing to pay or extend the debt, or the issuing of new obligations in renewal of the primary ones. No power, it is claimed, then remained in the board of supervisors except to provide by taxation for the payment of the debt at its maturity. If this claim was well founded it would not render invalid the loans made by Parker in 1864. They were precisely within the terms of the power conferred by the statute referred to, as construed by the defendant, and if the notes subsequently taken by Parker were invalid, the obligation of the county to repay the money borrowed would still remain and could be enforced, unless the remedy is barred by the statute of limitations. The loans made subsequent to 1864 would not stand upon the same foundation. But in

respect to such loans, if the money borrowed came to the use of the county and was actually applied in payment of its valid indebtedness, we are not prepared to say that there would be no remedy. The fact that the defendant is a county, forming one of the political divisions of the State and organized for public purposes, would not seem to be a sufficient reason for releasing it from the ordinary obligations of justice and equity, or for permitting it to retain the benefit of the loans, and at the same time repudiate any obligation for their payment. The contention that boards of supervisors have no inherent power to borrow money or to issue negotiable paper, accords with the general understanding and with the tenor of the adjudged cases, and the course of legislation, which presupposes the necessity of express legislative sanction, in order to justify the exercise of this authority. (See *Chemung Canal Bank v. Supervisors*, 5 Denio, 517, 524; *Brady v. Supervisors*, 10 N. Y. 260; *Starin v. Genoa*, 23 id. 439, 449; *Lynde v. County*, 16 Wall. 6; 7 Dill. Mun. Corp. [3d ed.], § 507.) In this State the powers of boards of supervisors are not only the subject of express affirmative definition, but for the purpose of confining the action of these bodies to the exercise of enumerated powers, it is declared that "no county shall possess or exercise any corporate power, except such as are enumerated or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." (1 R. S. 364, § 2.) The power of borrowing money is incident to the powers of a business corporation, unless excluded by its charter. (*Curtis v. Leavitt*, 15 N. Y. 9.) Boards of supervisors have the recourse of taxation for the raising of money for county purposes. The power to borrow money is not necessary to the execution of powers expressly given. But the denial of this power to those *quasi* public corporations also stands strongly upon considerations of public policy, and the doctrine that they have no implied power to borrow money is an important safeguard for the protection of political communities against the creation of ruinous liabilities, through the action of incapable, negligent or unfaithful public agents. We concur,

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therefore, with the proposition that the power of the board of supervisors to extend the original debt by means of new loans, or by renewals of prior obligations, if it existed, must be found in the statute, given either expressly or by implication. It is a matter of general notoriety and of public history that prior to the passage of the act, chapter 8, of the Laws of 1864, which was passed February 9, 1864, large obligations had been incurred by towns and counties throughout the State, for bounties and war expenses, without authority of law. It was one of the main purposes of that act to legalize and validate these unauthorized obligations, and to provide for their audit and final payment. In many cases, pursuant to the action of town boards and boards of supervisors, bonds and notes of towns and counties had been issued to represent advances so irregularly made. The act validated and legalized these transactions, and the fifteenth section authorized the original obligations to be continued or new bonds to be given, and declared that "any bonds or other county obligations issued, or which may hereafter be issued, in renewal or continuance of any of said bonds, are hereby legalized, ratified and confirmed." The first twenty-one sections of the act are mainly, if not wholly, curative and remedial. But by the twenty-second section, for the first time in the history of the war measures enacted in this State, the legislature, contemplating the future emergencies and necessities of the government, conferred upon boards of supervisors an affirmative power to borrow money upon the credit of the county and, in a certain contingency, upon the credit of any city or town, for the payment of bounties and other incidental purposes, to be exercised at any time "during the existence of the war." It was under this statute and the supplementary statute, chapter 92, of the laws of the same year, passed March 26, 1864, that the vast debt incurred by the counties and towns in this State for the suppression of the rebellion, which was outstanding and unpaid at the close of the war, was mainly created. The main purpose of the supplementary act of March 26, 1864, apparently was to make

the powers conferred upon boards of supervisors in respect to the creation of debts for war purposes still more comprehensive than under the prior act, and to leave no possible question that the public credit and the sovereign power of taxation were pledged for their redemption. The first section commences with the declaration that every county in the State shall be liable for all moneys borrowed, or which should be borrowed in pursuance of the notes, resolutions or directions of its board of supervisors for the payment of bounties to volunteers to fill its quota under any call of the president of the United States since the 1st day of October, 1863, or under any call which should be issued after the passage of the act. Following this declaration is a clause declaring every bond, certificate or other instrument which had been or should be issued, in pursuance of the votes, resolutions or directions of a board of supervisors, for the purposes specified, to be valid. The section concludes as follows: "And such board is hereby authorized and required to perform every agreement which it has made or shall make, or which has been or shall be made in pursuance of its votes, resolutions or directions, in respect to the exchange of bonds, certificates or other instruments so issued for other bonds, certificates or instruments, or in respect to paying the money so borrowed and the interest thereon, and to cause money to be raised from time to time on the taxable property of said county, to pay the money so borrowed and the interest thereon when the same shall become payable." It is insisted, on behalf of the defendant, that the power conferred on the board of supervisors by this section, to exchange one obligation for another, is a power which can be exercised only once in respect to the same debt, and that the obligation imposed to perform every agreement it may make, in respect to the payment of money borrowed, at most, authorizes only a single borrowing to pay an original loan. We think this narrow construction of the section is unwarranted. The acts of 1864 conferred upon boards of supervisors the power to borrow money without limitation as to amount for the purposes mentioned. It cannot

reasonably be supposed that the legislature contemplated that the large sums which had been and would be required for the payment of bounties and other expenses should be paid immediately by taxation. This would have imposed a burden upon the people which could not have been borne. Nor would it naturally be supposed that the legislature, while conferring upon boards of supervisors plenary power in creating debts, would take from them all discretion in dealing with the debts so created, so as to mitigate as far as practicable the burden of taxation. This power was clearly given to boards of supervisors with respect to debts contracted before February 9, 1864, by the fifteenth section of the act of that date, and there is no apparent reason why the legislature should not invest them with the same power in respect to debts contracted after that time. The duty imposed upon boards of supervisors in the last clause of section 1 of the act of March twenty-sixth, to cause money to be raised by taxation to pay the money borrowed, "when the same shall become payable," was for the benefit and protection of the creditor, and did not, we think, operate as a limitation of the power of the supervisors previously given to enter into any agreement for the exchange of securities, or for the payment of the money borrowed, in their discretion. We are of opinion that a fair and just construction of the act of March 26, 1864, upholds the power actually assumed and exercised by the defendant, and that the board of supervisors of Saratoga county was vested with the power to borrow money and renew its obligations from time to time for the purpose of paying or continuing its indebtedness created under the acts of 1864.

Passing this question, it is further contended on behalf of the defendant that, assuming that the board of supervisors had power to borrow money to pay existing obligations, and to issue obligations of the county for the new loans, or to renew them from time to time in its discretion, the power was not delegated to the treasurer by the resolutions under which he assumed to exercise this authority. The claim is, in substance, that the power conferred on the treasurer to

"procure an extension of the time of payment" of the bounty debt, conferred upon him no authority to borrow money to pay matured obligations, or to issue notes of the county for new loans or in renewal of existing obligations. A power given by a principal to an agent to extend a debt, is not, it is said, a power to pay or extinguish it, and does not include the power of borrowing money in the name of the principal to pay the debt authorized to be extended, or to give notes therefor, although the effect of the transaction might be to give time to the principal. All that Mann was authorized to do, it is claimed, was to see the creditors of the county and procure their consent to give further time for the payment of their debts, and if they refused, his power was exhausted. He could neither make new loans to take up the paper falling due, nor could he execute new notes in renewal of existing obligations, although the creditors might be willing to accept them in exchange for the original security. The question thus presented depends upon the true construction and scope of the language of the resolutions of the board. They are to be construed in accordance with the ordinary rules of construction applicable to all written instruments, by which, in order to ascertain the intention where there is obscurity, or where the language employed may be used in different senses, or may have a broad or narrow interpretation, courts may, in aid of the interpretation, consider the attendant circumstances the situation of the parties and the object in view. In considering this question it is important to bear in mind the subject with which the board of supervisors was dealing. When the first resolution was passed, in November, 1865, the town bounty debt (so-called) amounted to nearly half a million dollars. It was represented by a large number of separate obligations held by banks and private individuals. The board of supervisors, at its annual session in November, provided for raising a certain amount by taxation, to be applied upon the bounty debt. But after applying this sum there would remain a large amount, probably not less than \$100,000 of the debt, maturing February 15, 1866, for the

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payment of which no provision was made by the board and no action of any kind taken in respect to it, except by the resolution directing the treasurer to procure an extension of the time of payment. The same condition existed each year and the same action was taken by the board, the amount falling due in each February, for which no tax was levied, varying from year to year, in several years approaching the sum of \$100,000. It is well known that the annual meeting of the board of supervisors is held in November or December, when the annual taxes are levied. If the resolutions of the board of supervisors are subject to the narrow construction claimed by the defendant, it would follow that the board left a large debt, falling due each year between the meetings of the board, unprovided for, except in the contingency that the treasurer would be able to induce the numerous creditors by whom it was held to forbear the collection of their claims when due and consent to postpone their payment. It is certainly quite improbable that he would be able to do this in all cases. The main purpose of the resolutions was to secure further time for the payment of the part of the county debt soon to mature, not included in the tax levy. By the method adopted by the treasurer the debt was not paid, but only extended. New creditors were substituted for old ones; the debt remained the same. The supervisors, in passing the resolution, did not have in view particular individuals, who might be holders of the county obligations, but the debt as a whole; and the sole purpose of their action was to secure the continuance of the debt so as to avoid the necessity of immediate and onerous taxation. The authority is to be construed with reference to the circumstances. It may very well be that an authority from a principal to an agent to procure an extension of a single debt owing to a particular individual would not include a power in the agent to borrow money to pay it. But an authority given to a county, by the legislature, to extend its indebtedness, would, we think, fairly include the power to do it by borrowing money and substituting new obligations in place of the old

ones. It would be a usual means, in such a case, of accomplishing the authorized purpose. The board of supervisors gave a practical construction to the resolutions in their dealings with the treasurer. In each year, from 1865 to 1875, the accounts of the treasurer were audited by a committee of the board. He presented as vouchers each year notes which had been issued by him as treasurer, which on their face referred to the resolution of the year preceding that in which they were given, as his authority for issuing them. These vouchers, amounting in the aggregate during this period to several hundred thousand dollars, were accepted without objection and allowed as credits on his accounts. The inference is well nigh irresistible that the board was cognizant of the construction put by Mann upon his authority; and the acquiescence of the board during this long period, in his assumption of the power to borrow money and give new obligations as a means of extending the debt, is cogent evidence that the authority intended to be conferred included these transactions. The only fact having a contrary tendency is found in the resolution of November 22, 1867. This resolution, it is claimed, indicates that the board distinguished between the power to borrow money to carry the debt and the power of extension. This single act does not, we think, over-bear the clear indications furnished by the circumstances to which we have alluded, that the board when it passed the annual resolution authorizing the treasurer to procure an extension of the town bounty debt, understood that it included the power to extend by borrowing. The express authority to borrow contained in the resolution of November 22, 1867, may have been inserted to authorize temporary loans in case the treasurer should be unable in the first instance to fund the debt for the considerable time mentioned in the resolution. We are of opinion, therefore, that the authority to extend the debt given in the resolutions included the power to accomplish this purpose by making new loans and paying the matured debts from the proceeds and the giving of new obligations for the new advances. The power, so construed,

was undoubtedly very broad, but for years the board of supervisors appear to have reposed the utmost confidence in the treasurer, and that a power may be abused does not disprove its existence.

The further objection that there was no town bounty debt, and therefore no subject for the exercise of the authority conferred on the treasurer, is clearly untenable. By the twenty-second section of the act of February 9, 1864, the board of supervisors was authorized to borrow money on the credit of a town only upon the vote of a majority of its electors. There was no vote of the towns authorizing the debt, and the money borrowed, by which the town bounty debt (so-called) was created was, in fact, borrowed on the credit of the county, and the town bounty debt mentioned in the resolution was legally a debt of the county and not of the several towns. (*People v. Supervisors of Livingston Co.*, 34 N. Y. 516.) It was, however, treated as a town debt and taxes were levied from time to time for its payment. The authority vested in the treasurer related to this debt, whatever may have been its legal character, and in construing the authority it is wholly immaterial that the debt was not described with legal accuracy. There was and could be no mistake as to the debt intended, and it was identified by the description usually employed by the supervisors.

The final question on the merits relates to the liability of the county for the money loaned by Parker, the intestate, in view of the conceded and unquestioned frauds committed by Mana in the assumed exercise of the authority conferred by the resolutions of the board of supervisors. As has been stated, there were outstanding at the expiration of his last term of office in December, 1875, notes made by him as treasurer, exceeding by \$118,000 what would have been the actual just debt of the county if the amount raised by taxation subsequent to 1865 had been properly applied, and he had borrowed year by year such an amount only as was necessary to extend the portion of the debt which he was requested to have extended by the supervisors of the respective towns.

The defendant relies upon the general doctrine of agency, that the principal is bound only by acts of the agent, which are within the scope of his commission, and it is, therefore, insisted that Mann could not bind the county by borrowing money or issuing notes in excess of his actual authority. The plaintiffs, on the other hand, while admitting the general rule, invoke the doctrine now firmly established in this State in respect to private agents and the agents of business corporations, "that when the principal has clothed his agent with power to do an act, upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act executing the power is itself a representation, a third person, dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." This statement of the doctrine is taken from the leading case of *N. Y. & N. H. R. R. Co. v. Schuyler* (34 N. Y. 30, 73), which finally and conclusively established in this State the principle enunciated, which prior to the decision in that case had been the subject of conflicting adjudications. If we were now called upon to determine whether the principle of the law of agency established by this case applies to public as well as private agents, the question would deserve most careful and grave consideration. It would be necessary to consider, in view of the nature and purposes of public agencies, the manner in which they are usually constituted, the magnitude of the public interests involved in the question and of the dangers to which the public would be exposed, the distinction which in some cases unquestionably exists between the acts of public and private agents and their power to bind their principals, whether these and like considerations afford a just and solid ground for declaring the doctrine adverted to — to be inapplicable to the case of agents charged with the exercise of public trusts, and whether the true rule demanded by public safety does not require that the validity of the acts of public agents must, in all cases, be tested by and exclusively

depend upon their actual authority, of which those dealing with them must at their peril take notice.

But preceding this inquiry is a fact which, in logical sequence, must be first ascertained before the inquiry suggested becomes relevant, and that is whether the transactions between the treasurer and Parker, the intestate, were within or outside of the actual authority conferred on the treasurer by the resolutions of the board of supervisors. The actual authority of the treasurer, as we have held, authorized transactions and dealings in form of the same precise character as those which took place between the treasurer and Parker. The treasurer was authorized to borrow money and give notes therefor binding upon the county, but the authority to borrow was restricted to the amount necessary to extend such part of the town bounty debt as he should be requested by the towns to extend, and the authority to give new obligations was limited to the giving of obligations for the actual debt thus extended or obligations in renewal. It was shown that in fact Mann borrowed money and gave notes largely in excess of his actual authority. Did that proof *prima facie* establish a defense to the action? The plaintiffs, who sought to charge the defendant for the acts of an assumed agent, were bound in the first instance to show his authority, and that the acts of the agent were within the authority, or to give evidence which raised a presumption that the acts were part of the authorized transactions. They proved the resolution of the board of supervisors and the transactions with the intestate. It is a well settled doctrine of agency that whenever the act of the agent is authorized by the terms of the power, that is, whenever comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. (COWEN, J., *North River Bank v. Aymar*, 3 Hill, 262.) Applying this test to the acts of Mann, nothing is lacking to establish his authority in the transactions with Parker, except that as it was shown that he fraudulently borrowed

money and issued obligations in excess of the limit fixed in the resolutions, and that those transactions may have been a part of the fraudulent dealing. The question arises upon which party the burden rested to identify the transactions of Mann with Parker, as either within or as outside of and in excess of the actual authority. The question, it will be observed, is quite distinct from the question of the liability of the county, assuming that it was established that Mann had borrowed all the money he was authorized to borrow before borrowing of Parker. The present question is what, in the absence of any proof on the subject beyond the fact that frauds were committed by Mann, is the presumption as to the transactions with Parker. Are the plaintiffs entitled to a presumption that they were within the actual authority until further evidence should be given by the defendant tending to identify the particular dealings with Parker as a part of the fraudulent dealings. The cases holding that where conditions precedent to the existence of an agency are imposed, and which must be performed before a delegated authority comes into existence at all, the burden rests upon the party claiming to bind the principal by the act of the agent to show that the precedent conditions have been fulfilled, of which the case of *Starin v. Town of Genoa* (*supra*) is an example, are not relevant to the discussion. In the present case the agency was duly constituted. The agent was authorized to borrow money and issue obligations within certain specified limits. Parker loaned his money in good faith upon the assumption that Mann was acting within the limits fixed by the resolutions. The acts done by Mann in form correspond in all respects with the terms of the power. The evidence does not show that they were not within its actual limits. They may, or may not have been. The evidence does not disclose how the fact is. The burden, we think, lay upon the defendant to show that the transactions with Parker were outside of the limits of his authority. The defendant appointed the agent. It fixed a limit to his authority. It reposed a confidence, and persons dealing with

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the agent, would naturally assume that he was acting within his powers. If a particular act of an agent is outside of his authority, the principal ordinarily would be best able to show the fact. The defense in this case rests upon an impeachment of the fidelity of Mann in the course of his agency, without proof that he exceeded his authority in the particular instances in question. It is, we think, a just rule, supported by analogies, that when the act of the agent apparently conforms to the authority and includes the particular transaction, and is not in excess of the authority conferred, so far as third persons dealing with the agent can know, the act of the agent is presumptively within the authority conferred; and that the burden of proving that it was done after the authority was spent rests upon the principal; and that the burden is not met nor the presumption overthrown by proof that in the course of the agent's dealings he fraudulently exceeded his authority, without showing or giving evidence from which a jury would have a right to infer that the particular transaction was unauthorized; and we think it makes no difference whether the agency is a general one, or confined to a particular series of transactions for the principal. (*Gansevoort v. Williams*, 14 Wend. 138.) It is found, in substance, by the trial judge that the loans made by Parker were made in good faith; that it did not appear that the treasurer misappropriated any of the money borrowed of Parker; that at no time did the indebtedness, which the treasurer was authorized to extend, fall short of the loans made by Parker or the notes issued in renewal. In short, the defendant failed to identify the transactions with Parker as in excess of the actual authority vested at the time in the treasurer. It was shown that in some years notes were issued to Parker after the treasurer had renewed notes held by other parties, exceeding in amount the debt which the supervisors had requested him to extend. But there is as much reason for regarding these notes as representing unauthorized loans, as there is for regarding the notes surrendered by Parker on receiving new notes, as of that character. We are of opinion, therefore, that a *prima facie* case was

made by the plaintiffs, which was not overcome by the defendant. This conclusion may subject the defendant to liability for debts which it never authorized, because it seems probable that it may never be able to trace the line between valid and authorized debts and the false and fraudulent over issues. In the case of *Mechanics' Bank v. New York and New Haven Railroad Company* (13 N.Y. 599, 619), COMSTOCK, J., referring to a somewhat similar situation, said: "The corporation may be compelled to respond to the holders of certificates amounting in the aggregate to more than its capital, because it cannot distinguish between those which are spurious and those which are genuine." Unless the burden of proof, upon the case now presented, is upon the defendant to distinguish between the genuine and fraudulent transactions, the county by raising a doubt can escape the payment of any part of its indebtedness.

The counsel for the defendant also assails the validity of the resolutions of the supervisors, on the ground that they assumed to delegate to Mann the judicial and legislative power of the board to ascertain and determine the extent and amount of the liabilities of the county, and to audit and allow the same. This objection rests, we think, on a misconception of the scope of the authority conferred. The authority was to procure an extension of the town bounty debt, a debt already existing, having a perfectly defined character, and not to create a new debt or to pass upon or allow a disputed or doubtful claim. The further objection that the claim should have been presented to the board of supervisors for audit is untenable. The bonds and notes of a county, issued for loans authorized by law, are not open *accounts* for county charges, which must be presented to the board for audit.

For the reasons stated, and without passing upon the question whether the county could be charged, in case it had been affirmatively shown that the notes in question were fraudulently issued by the treasurer in excess of his authority, we think the judgment should be affirmed, with a modification,

Statement of case.

however, confining the recovery of interest on the notes after January 1, 1880, to the statutory rate of six per cent.

All concur, except PECKHAM, J., not sitting.

Judgment accordingly.

CHARLES RAHT, as Executor, etc., Respondent, v. HENRY Y. ATTRILL, et al., MORTON, BLISS & Co., et al., Claimants, Appellants.

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The lien of a mortgage attaches not only to the land in the condition in which it was at the time of its execution, but as changed or improved by accretions or by labor expended upon it while the mortgage is in existence; and creditors, whose debts were created for money, labor or materials used in the improvement, acquire no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection.

The R. B. I. Co. was organized for the purpose of erecting and managing a hotel. It purchased lands subject to a mortgage, and to raise funds to build the hotel sold and hypothecated its bonds secured by a trust mortgage on the hotel property. Having exhausted all of its available means, and being indebted to a large amount for labor, materials, etc., before the completion of the building, in an action brought by a stockholder to dissolve the corporation, a receiver was appointed, who by an *ex parte* order in said action was authorized to borrow on his certificates \$180,000 for the "purpose of paying the employes of said company," which certificates were declared by the order to be a first lien, prior to the trust mortgage. Neither the trustee nor the bondholders were then parties to the action, and they had no notice of the application for the order. Under said order \$110,000 of certificates were issued by the receiver. On foreclosure of the original mortgage a surplus arose, and in proceedings to determine the priority of claims thereto *held*, the fact the company was owing debts for labor created no equity for their payment in preference to the bondholders; and that so much of the order as made the certificates prior liens was void.

In the surplus money proceedings the order was sought to be sustained on the ground that when it was granted a large number of laborers whose wages were in arrears were absolutely destitute, had become riotous, and threatened, unless paid, to burn the hotel building, and the referee found that but for the advancement of money on the certificates which enabled the receiver to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have

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been destroyed or seriously injured." *Held*, that this did not justify the order; that the debt so created by the receiver was not one for preservation; that it could not be assumed that the ordinary agencies of the law were insufficient to furnish the requisite protection.

Also, *held*, that the granting of the order without notice to the mortgagee or bondholders did not bind them as an adjudication; that they were entitled to notice and an opportunity to be heard.

Wallace v. Loomis (97 U. S. 144); *Fordick v. Schall* (99 id. 235); *Barton v. Barbour* (104 id. 126); *Millenberger v. L. R. Co.* (106 id. 286); *U. T. Co. v. Souther* (107 id. 591); *Burnham v. Bowen* (111 id. 776); *U. T. Co. v. I. M. R. R. Co.* (117 id. 454, 456), distinguished.

(Argued March 15, 1887; decided October 4, 1887.)

APPEALS by various claimants from order of the General Term of the Supreme Court, in the second judicial department, made September 16, 1886, which reversed an order of Special Term confirming the report of a referee as to the disposition of surplus moneys arising on foreclosure sale herein.

This action was brought to foreclose a mortgage executed by defendant Attrill to one Littlejohn, and by him assigned to plaintiff's testator.

In February, 1880, the Rockaway Beach Improvement Company, limited, was organized under the business corporation act, chapter 611, Laws 1875. It bought over 100 acres of land at Rockaway Beach, subject to a purchase-money mortgage, which is the mortgage in suit. On April 1, 1880, said company executed a mortgage on the same property to William K. Soutter, trustee, to secure the payment of 700 bonds of \$1,000 each. Twenty-six of these bonds were disposed of for value, the balance pledged at fifty cents on the dollar, as collateral for loans to the company. The company became embarrassed, and on August 2, 1880, Henry Y. Attrill, a large stockholder, began an action against it on behalf of himself and all other stockholders who should unite with him, praying for the appointment of a receiver and the dissolution of the company. A receiver was appointed who under various orders of the court, specified in the opinion herein, issued his certificates as therein stated. The order of the Special Term awarded the surplus to the holders of the receiver's certificates issued under the first order.

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John D. Cadwalader for Morton, Bliss & Co. and others, appellants. As a general rule it is only interests in the land itself or liens upon it that have been cut off by a foreclosure sale that are transferred to surplus moneys arising upon such a sale and are entitled to be paid therefrom. (*Fliess v. Buckley*, 22 Hun, 554, 555; 24 id. 515; 90 N. Y. 286, 292; *People v. Bacon*, 99 id. 278.) But before there can be said to be any surplus, properly speaking, arising from a foreclosure sale, besides the mortgage debt and interest, and the costs, etc., of the foreclosure suit, certain charges on the property must be paid; these are what are called expenses of preservation. (*In re Regents C. I. W'ks. Co.*, L. R. 3 Ch. D. 411, 427.) When a receiver of a railroad is appointed, pending foreclosure, it is usual for the court to impose, as a condition of making the appointment, the equitable terms that current income earned by the road, while in the hands of a receiver, shall be applied to the discharge of certain claims "of a highly meritorious nature," such as arrearages of wages, debts for supplies, etc., incurred within a short time prior to the receivership, rather than to the payment of mortgage interest. (*Fosdick v. Schall*, 99 U. S. 235, 251; *Union Trust Co. v. Souther*, 107 id. 776, 783; *Burnham v. Bowen*, 111 id. 776, 783; *U. S. T. Co. v. N. Y., W. S. & B. R. Co.*, 25 Fed. R. 800, 802; *Jones Railroad Securities*, §§ 541, 542.) The unpaid operatives, etc., having become mutinous and threatened to destroy the property of the company, the court was authorized in directing a large issue of receiver's certificates. (*Ex parte Jordan*, 94 U. S. 248, 249; *Stevens v. N. Y. & O. M. R. R. Co.*, U. S. Cir. Ct. March 9, 1876; *A. M. & O. R. R. Case*, 3 Hughes, 320, 337, 338; *Wallace v. Loomis*, 97 U. S. 146, 162, 163; *Miltenberger v. L. R. Co.*, 106 id. 286, 311, 312; *Blair v. St. Louis H. & K. R. Co.*, 22 Fed. R. 471, 473; *Woodruff v. E. R. Co.*, 93 N. Y. 609, 623; *Union Trust Co. v. Ill. M. R. Co.*, 117 U. S. 434.) All debts incurred by a receiver for necessary repairs, and for the general protection and preservation of the property may be made a charge upon the *corpus* of the property itself. (*Meyer v. Johnson*, 53 Ala. 237, 345,

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350; *Wallace v. Loomis*, 97 U. S. 146, 162, 163; *V. & C. R. R. Co. v. V. C. R. R. Co.*, 50 Vt. 500, 576; *Hoover v. Montclair, etc., R. R. Co.*, 29 N. J. Eq. 4; *Hale v. N. & L. R. R. Co.*, 60 N. H. 333, 341; *McLane v. P. & S. V. R. R. Co.*, 66 Cal. 606, 617-629; *Union Trust Co. v. Ill. M. R. Co.*, 117 U. S. 434, 454 *et seq.*) The operating expenses of an insolvent railroad are preferred, as necessary for the preservation of the property. (*Meyer v. Johnson*, 53 Ala. 237, 346; *Ellis v. B. H. & E. R. R. Co.*, 107 Mass. 28; *Barton v. Barbour*, 104 U. S. 126, 134, 135; *Poland v. Lam. V. R. R. Co.*, 52 Vt. 178; *Woodruff v. E. R. Co.*, 93 N. Y. 609, 620-622; *McLane v. P. & S. V. R. R. Co.*, 66 Cal. 606, 623; *U. T. Co. v. Ill. Mid. Ry. Co.*, 117 U. S. 434, 464, 465; *Met. Trust Co. v. T. V., etc., R. R. Co.*, 103 N. Y.) The test is whether it has been shown that the debts or expenses for which priority is claimed, were necessarily incurred for the protection or preservation of the property in the hands of the courts. (60 N. H. 341; *Scott v. Delahunt*, 65 N. Y. 128; *Woodruff v. Erie R. Co.*, 93 id. 609, 622, 623; *Meyer v. Car Co.*, 102 U. S. 13; *U. T. Co. v. Ill. Midland R. Co.*, 117 U. S. 463, 464.) Receiver's certificates are not in any sense commercial paper; and even in the hands of a *bona fide* holder for value, they are not good for what they purport to be, without proof of the circumstances under which they were issued. No intendment can be made as to their validity even, or as to the lien they may purport to create, from bare recitals on their face. (*Stanton v. A. & C. R. R. Co.*, 2 Woods, 506; *Newbold v. P. & S. R. R. Co.*, 5 Bradw. [Ill.] 367; *Bank of Montreal v. C. C. & W. R. R.*, 48 Iowa, 518; *Turner v. P. & S. R. R. Co.*, 95 Ill. 134; *U. T. Co. v. C. & L. H. R. Co.*, 7 Fed. Rep. 513; *McCurdy v. Bowes* 88 Ind. 583, 586, 587; *U. T. Co. v. Ill. Mid. R. Co.*, 117 U. S. 456.) The debts and disbursements stated by receiver De Grauw to have been incurred by him, as receiver, are no lien upon the surplus moneys. (*In re Marine Mansions Co.*, L. R. 4 Eq. 601; *In re Oriental Hotels Co.*, L. R. 12 Eq. 126; *In re Regents C. I. Wks Co.*,

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3 Ch. Div. 411, 427; *In re Dronf. S. Coal Co.*, 23 id. 513, 516.) The necessity of preserving the property in the hands of the court, on well established principles of equity, justified the creation of a prior equitable lien upon it, in favor of the parties who supplied the means for such preservation. (*Jones Railroad Securities*, §§ 541, 542; *Harvey v. Ill. Mid. R. Co.*, 28 Fed. Rep. 176.) A complete estoppel as against all other claimants exists in favor of the holders of the certificates representing the advances made the receiver for the preservation of the property, the other claimants having by their act acquiesced in raising the money. (*Battershall v. Davis*, 31 Barb. 323, 327; *Wallace v. Loomis*, 97 U. S. 146, 163; *Humphreys v. Allen*, 101 Ill. 490; *Credit Co. v. Ark. C. R. R. Co.*, 15 Fed. Rep. 46, 52; *Shaw v. Railroad Co.*, 100 U. S. 611, 612; *U. T. Co. v. Ill. Mid. Ry. Co.*, 117 id. 463, 464.)

Clarence D. Ashley for Attrill & Marache, appellants. All receiver's certificates issued to pay for the expenses properly incurred by the receiver, during the receivership, for the protection and preservation of the property in his charge, are a first lien on the fund herein, and should be paid in full in preference to the Soutter mortgage and other liens of record. (Kerr on Receivers [2d ed.], 2; *Woodruff v. E. R. Co.*, 93 N. Y. 609, 623; *Wallace v. Loomis*, 97 U. S. 146; *Miltenberger v. Logansport, etc., R. Co.*, 106 Ill. 286; *Met. T. Co. v. T., etc., R. R. Co.*, 4 Cent. Rep. 364; *U. T. Co. v. Ill. Mid. R. R. Co.*, 117 U. S. 456.) The Soutter mortgage being of prior record to all other record liens, has precedence over them. (*McKinstry v. Mervin*, 3 Johns. Ch. 466; *N. Y. L. Ins. & T. Co. v. Vanderbilt*, 12 Abb. Pr. 458, 460; *Stuyvesant v. Browning*, 33 N. Y. Super. 203; *Oppenheimer v. Walker*, 3 Hun, 30; *Ackerman v. Hunsicker*, 85 N. Y. 43; *Dunscomb v. N. Y. H. & N. R. R. Co.*, 84 id. 190; *S. C.*, 88 id. 1.) The \$110,000 of receiver's certificates held by Morton, Bliss & Co., and others are not entitled to any preference, and have no lien on the surplus moneys herein, having been issued to pay for work done prior to the receivership. (*Met. T. Co. v. Ton., etc.*,

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R. R. Co. 4 Cent. Rep. 364.) All certificates issued to pay for the proper and necessary care or protection of the property should be held to be of equal priority. (*Un. Tr. Co. v. Ill. Mid. R. R. Co.*, 117 U. S. 456, 477; *Wallace v. Loomis*, 97 id. 146.)

James McNamee for appellant. The court had the power to make the orders under which the certificates held by this defendant were issued, and to give such certificates a priority of lien, and this lien can be enforced in this proceeding. (*Met. Tr. Co. v. Ton. etc., R. R. Co.*, 8 N. E. R. 488; *Wallace v. Loomis*, 97 U. S. 146; *U. T. Co. v. Ill. Mid. R. Co.*, 117 U. S. 456; *Woodruff v. E. R. Co.*, 93 N. Y. 609, 623; *Stanton v. A. & C. R. R. Co.*, 2 Woods, 506; *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286, 311.) The receiver's certificates, issued to Drexel, Morgan & Co., Bliss & Co. and W. B. Hatch, are not entitled to any preference over those held by this defendant. (*Cowdrey v. Galveston R. R. Co.*, 11 Wall. 478; *Un. Tr. Co. v. Ill. Mid. R. R. Co.*, 117 U. S. 434; *Sanford v. McLean*, 3 Paige 142; *Gaus v. Thieme*, 93 N. Y. 225, 232.) The bondholders are estopped by their laches from denying the priority of the receiver's certificates, irrespective of the question whether they were issued for a proper purpose. (*U. T. Co. v. Ill. Mid. R. R. Co.*, 117 U. S. 434; *Att'y-Gen'l v. Cont. Ins. Co.*, 28 Hun, 360.) The most the bondholders could do was to contest the necessity and propriety of the orders under which the certificates in question were issued. (*Un. T. Co. v. Ill. Mid. R. R. Co.*, 117 U. S. 434.)

Edward S. Clinch for appellants. Claims, however equitable, which had not matured into liens cannot be taken into consideration by the referee. (*Husted v. Dakin*, 17 Abb. 137; *King v. Selby*, 10 How. 333; *Bergen v. Carman*, 79 N. Y. 146.) The validity of the Soutter mortgage and of the bonds could be inquired into on this proceeding. (*Bergen v. Carman*, 79 N. Y. 146; *Kamp v. Kump*, 59 id. 212;

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Windsor v. Mc Veigh, 93 U. S. 274.) A receiver is not authorized to issue certificates to pay the claims of employes for labor performed before his appointment. (*Met. Tr. Co. v. Ton. V. & C. R. R. Co.*, 103 N. Y. 245.)

Lewis Sanders for bondholders and trustee, respondents. The court had no power to appoint a receiver. (Laws of 1870, Chap. 151, p. 422; *Gilman v. G. S. R. Co.*, 4 Lans. 482; High on Receivers, § 288; *Folger v. Col. I. Co.*, 99 Mass. 267, 275; *Wilmersdoefer v. L. M. Imp. Co.*, 18 Hun, 387.) The receiver's certificates were invalid, not having been issued in this action, and the action in which they were issued never having proceeded to judgment. (*Meyer v. Johnston*, 53 Ala. 348; *Un. Tr. Co. v. Walker*, 107 U. S. 596.) The validity of the receiver's certificates is open to attack whenever they are sought to be enforced. (*Windsor v. Mc Veigh*, 93 U. S. 277; *Kamp v. Kamp*, 59 N. Y. 217, 221.) The consideration for the certificates being against public policy and the public good, they are void. (*Egerton v. Brownlow*, 4 H. of L. C. 99, 100, 140, 148; *Keir v. Leeman*, 6 Q. B. 308; *Gilbert v. Sykes*, 16 East, 150; *Jones v. Randall*, Cowp. 37; *Cope v. Rowland*, 2 M. & W. 157; *Payne v. Wilson*, 74 N. Y. 348.) Receiver's certificates, to be a first lien, are issued only: *First*. In an action affecting a corporation serving a public use, such as a railroad, and where such company is in actual operation. (*Meyer v. Johnson*, 53 Ala. 237.) *Second*. Where the action is by a lienor. (High on Receivers, § 11; Jones on Securities, § 539.) *Third*. The certificates are entitled to preferences over mortgages only to the extent that current income has been diverted from payment of current expenses and applied to the benefit of the lienors. (*Fosdick v. Schall*, 99 U. S. 235; *Huidekoper v. Locomotive Works*, 99 U. S. 258, 260; *Burnham v. Rose*, 111 U. S. 782.) The Soutter bonds and mortgage valid. (*Curtis v. Leavitt*, 15 N. Y. 63; *Barry v. Merch. Exch. Co.*, 2 Sandf. Ch. 280, 289.)

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ANDREWS, J. The scheme set on foot by the principal stockholder, with the consent of a majority of the trustees of the Rockaway Beach Improvement Company, for the administration of its affairs and for the completion, furnishing and operating the hotel through the instrumentality of a receiver appointed by the court, has proved a signal and disastrous failure. The receiver was appointed August 2, 1880, within six months after the organization of the company. Prior to that date the company had expended more than \$350,000, raised on the sale and hypothecation of its bonds, secured by the trust mortgage to Soutter, leaving the hotel building and structures but partially completed, and had exhausted all its available means, and was indebted in the sum of nearly \$300,000 for labor, materials and furniture, which it had no means to pay. The receiver, a few days after his appointment, made his first application to borrow money on receiver's certificates, and on the 17th of August an order was made *ex parte* at Special Term, authorizing him to borrow \$130,000, for the "purpose of paying the employes of said company," and to issue therefor certificates containing on their face a declaration that the debt represented thereby was "a debt of the receiver incurred for the benefit and protection of the property in his hands, and a first lien thereon prior to the mortgage to William K. Soutter, trustee, for \$700,000, executed April 1, 1880, and to the interest on said mortgage." From time to time thereafter, and up to May, 1881, orders of a similar character were obtained, authorizing the issuing of further certificates for money to "furnish, finish and operate the hotel," also with priority of lien over the Soutter mortgage. Certificates were issued under the various orders, to the amount in all of between \$350,000 and \$400,000, the proceeds of which presumably were used to carry forward the hotel enterprise. In May, 1881, while the Attrill suit, in which the orders were granted, was pending, an action was commenced by the attorney-general to dissolve the corporation. Thereafter, in September, 1881, an action was commenced by Raht, executor, to foreclose the original purchase-money mortgage

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of \$72,000, which went to a decree April 10, 1882, and under which the hotel property was sold January 31, 1883, making a surplus of \$86,283.39, the distribution of which is the subject of the present controversy. It will be seen from this general statement that the efforts of the receiver to administer the property "for the benefit of all concerned," were terminated after a million dollars had been expended in improving it, in a sale of the whole property of the corporation for a sum of less than \$200,000, and all that is left from the wreck for the payment of creditors, whose aggregate claims exceed \$800,000, is the salvage of \$86,000. This case illustrates what I apprehend has been the common experience where a court departing from its appropriate judicial function has undertaken to manage and carry on the business of a failing and insolvent corporation.

The principle controversy is between the mortgage creditors under the Soutter mortgage, and the holders of the \$110,000 of certificates issued under the order of August 17, 1880. There is a controversey between the holders of the different classes of certificates. The holders of certificates, issued under the orders subsequent to August 17, 1880, insist that they are entitled to share ratably in the surplus with the holders of the certificates first issued, which claim has been adjudicated against them in this action. The question becomes unimportant if it shall be held that the mortgage creditors have the first lien on the fund in question, as their claims largely exceed the whole surplus.

Except for the provision in the order of August 17, 1880, giving to the certificates issued thereunder priority of lien to the Soutter mortgage, there, of course, could be no question as to the right of the bondholders to a preference. As between creditors by mortgage and general creditors, the former are entitled to priority of payment out of the mortgaged property by their contract, and by law of the land. The law recognizes the validity of contracts of mortgage and enforces them, subject to certain regulations for the protection of subsequent purchasers or

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incumbrancers. The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed or improved by accretions, or by labor expended upon it while the mortgage is in existence. Creditors having debts created for money, labor or materials used in improving the mortgaged property, acquire on that account no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. The order of August 17, 1880, assumes to create a prior equitable lien in favor of the holders of certificates. This is put in the order on the ground that the debt authorized was for the benefit and protection of the property. There are no facts recited in the order, nor were any presented to the court in the affidavit upon which the order was granted, which afford the slightest justification for subverting and postponing the prior legal lien of the mortgage creditors, without their consent, to the debts authorized to be created by the order. The fact that the company was owing debts for labor, created no equity for their payment in preference to the bondholders. In view of our decision in the case of *Metropolitan Trust Company v. Tonawanda Valley and Cuba Railroad Company* (103 N. Y. 245), it is needless to say that however meritorious these claims were, this of itself presented no reason or justification for paying them out of the property of the bondholders, by depriving them of the security pledged to them before the labor debts were contracted. The affidavit upon which the order of August 17th was based shows that the company was in serious financial embarrassment, but falls far short of disclosing any extraordinary emergency which called for extraordinary methods for the preservation of its property.

But the validity of the order, so far as it assumes to give priority to holders of certificates to be issued thereunder, was sought to be supported on the inquiry before the referee in the surplus money proceedings, on a ground which was not presented to the court when the order was granted. This ground, as stated in the report of the referee, is, in substance, that a large number of workmen, comprising

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eight hundred or a thousand men, whose wages, during May, June and July, were in arrears, but who had continued work under promises of payment, all of which had been broken, had reached a state of absolute destitution and, in many cases, of starvation, and that at the time the order was made they had stopped working, but remained on the premises and had become riotous in their language and demeanor and threatened, unless paid, to burn the hotel building and erections and personal property therein, and the referee found that but for the action of the bankers who took the certificates and advanced the funds by which the receiver was enabled to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have been destroyed or seriously injured."

The question presented is, whether these circumstances justified, or, if presented to the court, would have justified, the order preferring advances made thereunder to the lien of the mortgage. Before coming to this question, however, it is to be observed that the order was granted in a suit to which neither the trustee of the mortgage nor the bondholders were at the time parties, and without, so far as appears, any notice of the application for the order having been given to them or any of them. The original parties to the suit were Attrill, the principal stockholder of the company, who was plaintiff, and the corporation, The Rockaway Beach Improvement Company, which was sole defendant. On the 13th of August, 1880, an order was made on the application of the receiver, enjoining certain bondholders named from selling or transferring bonds issued under the Soutter mortgage, held by them in pledge, which order was served on the persons and firms named therein. But so far as appears they were not then made parties to the action, and the order was doubtless procured to arrest the apprehended danger of a sacrifice of the bonds by the pledgees, referred to in the complaint. This order gives no intimation of an intention to apply for an order authorizing the issue of receiver's certificates. Soutter, the trustee under the mortgage, was made a party defendant at a subsequent stage of the action, but after the certificates under

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the order of August 17th were issued and the advances made. The granting of the order with out notice to the mortgagee or to the bondholders, did not bind them as an adjudication, assuming that the court had jurisdiction to appoint a receiver in the Attrill action, a point which will be assumed without examination. The bondholders, or their trustee, were entitled, by the plainest rules of law and justice, to notice and the right to be heard before their rights under the mortgage could be affected; and it was open to them on the hearing before the referee to contest the order, both on the facts and the law. As was said by BLATCHFORD, J., in *Union Trust Company v. Illinois Midland Company* (117 U. S. 434, 456), "the receiver, or those lending money to him or certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans."

On the merits we are of opinion that a case was not made out either before the court which granted the order or before the referee on the reference, which, within any recognized doctrine regulating or defining the powers of a court of equity in the administration of property through a receiver, justified the order of August 17th, postponing the lien of the Soutter mortgage. The power of a court to appoint a receiver when a proper case is presented, is undoubted. It rests in the sound discretion of the court. The power itself and the object of its exercise were stated long since with admirable clearness by Lord HARDWICKE in *Skip v. Harwood* (3 Atk. 564): "It is a discretionary power exercised by the court with as great utility to the subject as any authority which belongs to it; and it is provisional only for the more speedy getting of a party's estate and securing it for the benefit of such person who shall appear to be entitled, and it does not at all affect the right." The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses, which are called expenses of preservation, may be

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incurred under the order of the court on the credit of the property, and it follows, from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or when necessary, out of the *corpus* of the property before distribution, or before the court passes over the property to those adjudged to be entitled. It is claimed that the money advanced in this case to protect the property from an incendiary burning, created a debt for preservation, which may be preferred to the claim of the bondholders. We are of a contrary opinion. No doubt a serious emergency existed, growing out of the discontent and riotous disposition of the workmen. But the State primarily assumes the duty of the preservation of public order, and the repression and punishment of crime. It enacts laws, constitutes courts, and commissions officers to this end. It especially makes provision intended to prevent riots, and it seeks to insure prompt action on the part of local officers and communities by imposing upon the latter pecuniary responsibility for injuries to property caused by riotous assemblages. In this case no attempt, so far as appears, was made by the receiver or by the company to secure the intervention of the public authorities to suppress the apprehended disturbance, or to arrest those who threatened to burn the property of the company. It clearly ought not to have been assumed that the ordinary agencies of the law were inadequate to the situation, or that the law, operating through its regularly appointed channels, was impotent to control it. It would be difficult to define by a rule, applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by JAMES, L. J., in *Regent's Canal Iron Works Company* (L. R. 3 Ch. Div. 411, 427), that "the only costs for the preservation of the property would be such things as the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property." Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17th,

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and that such an expenditure is and ought to be excluded from the definition. There must be something approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case.

We have not lost sight of the recent very important cases decided in the Supreme Court of the United States, involving the question of the power which may be vested by the court in receivers of insolvent railroad corporations, and the right of the court to provide for the payment of certain debts contracted before or after the appointment of a receiver out of income, and if that is inadequate, out of the *corpus* of the property. These cases and decisions are the outcome of the growth of railroad enterprises and business within a comparatively recent period. It has been held that under special circumstances the court may direct the payment of ante-receivership debts for labor or supplies contracted within a limited period before the insolvency, the adjustment and payment of traffic balances in favor of connecting roads, and may direct the receiver to operate the road pending the foreclosure, and to that end purchase necessary rolling stock for the use of the road and make repairs and improvements thereon, the expense of which shall be a charge on the property in priority to legal liens. (*Wallace v. Loomis*, 97 U. S. 146; *Fosdick v. Schall*, 99 id. 235; *Barton v. Barbour*, 104 id. 126; *Miltenberger v. Logansport Railway Co.*, 106 id. 286; *Union Trust Co. v. Souther*, 107 id. 591; *Burnham v. Bowen*, 111 id. 776; *Union Trust Co. v. Ill. Mid. and R. R. Co.*, *supra*.) It cannot be successfully denied that the decisions in these cases vest in the courts a very broad and comprehensive jurisdiction over insolvent railroad corporations and their property. It will be found on examining these cases that the jurisdiction asserted by the court therein is largely based upon the public character of railroad corporations; the public interest in their continued and successful operation; the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. It was said by WAITE, C. J., in *Fosdick v. Schall*

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(*supra*), that railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests ;” and, in *Barton v. Barbour* (*supra*), that “the new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control of its property by the courts charged with the settlement of its affairs and the disposition of its assets.” These cases furnish, we think, no authority for upholding the order of August 17th, or for subverting the priority of lien which, according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17th should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted.

There is no ground for alleging an estoppel against the bondholders, barring their right to a review of the action of the court. The claim of estoppel is based upon the assumed fact that the trustee knew that a receiver had been appointed, and did not intervene to prevent the issuing of the certificates. The trustee at the time was not a party to the action, and had no notice of the application for the order, or of the issuing of the certificates until after the advances were made. He was designated as a trustee by the company before the bonds were issued, and was one of the directors and stockholders of the corporation, positions which might bring his duty and interest into conflict. It would be most unjust under the circumstances to conclude the bondholders by his inaction or for the reason that after the advances on the certificates had been made, he, as one of the board of directors and as a stockholder of the company, participated in the action

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of meetings of directors and stockholders in which the order for the issuing of certificates was approved.

We perceive no valid reason why the expenses incurred by the reorganization committee under the reorganization scheme of 1881, and for which it is claimed a large portion of the bonds and other securities were pledged, may not be adjusted in this proceeding and the lien, therefor, if any, be enforced.

It is claimed that in any event there are certain expenses of the receivership chargeable against the fund in court. We do not perceive upon the facts presented that this claim has any foundation. However, we think a proper disposition of the appeal will be made by modifying the order of the General Term so as to make the reversal of the order of the Special Term absolute, leaving the parties to apply for a new reference, as they may be advised, on which all questions, except that of priority between the bondholders and creditors holding certificates, may be considered.

All concur.

Ordered accordingly.

On subsequent motion to amend remittitur the following order was handed down :

Ordered. That the remittitur be amended as follows :

1. So as to declare that any of the parties on notice may apply to the court below for a new reference.

2. So as to provide that the reversal of the order of the Special Term shall be without prejudice to the right of the holders of receiver's certificates to offer proof on any further reference of an estoppel *in pais* in their favor as against individual holders of bonds of the Rockaway Beach Improvement Company, limited, and generally that any party may raise any questions, excepting only such as have been actually determined on the present appeal.

3. So as to provide that in case the claimants, Morton, Bliss & Co., Drexel, Morgan & Co., and W. B. Hatch, or any of them, have received under the order of the Special Term, the fund or any portion thereof, they shall not be liable to account for any greater amount than the sum or sums actually received by them, with legal interest.

Statement of case.

HARRIET H. VILAS et al., Administrators, etc., Respondents,
v. JOHN B. PAGE et al., Appellants.

106	439
123	463
123	511

In an action to foreclose two railroad mortgages, V., one of the defendants answered, setting up a title to certain of the rolling stock under a levy and sale on execution against the railroad corporation; he claiming that, as against him, the mortgages were void as to personalty, because not filed as chattel mortgages. An interlocutory judgment was rendered in February, 1857, adjudging that the mortgaged property, other than that claimed by V., be sold, and referring the issues presented by his answer. Upon sale made in September, 1857, under the said judgment, the property was bid off by a committee representing the first mortgage bondholders; but a small amount, if any, of the sum bid was paid down. In March, 1858, upon petition of the receiver appointed in the action and on affidavit of the plaintiffs' attorney, an order was granted which authorized the receiver to expend a sum not exceeding \$27,500 in the purchase of necessary rolling stock for the road, on a credit, provided the purchase should be approved by plaintiffs or their attorney, and directing that sufficient of the purchase-money of the mortgaged premises be applied to pay the sum the receiver might contract to pay for the said rolling stock; which sum the order declared was thereby made "a first lien on the said mortgaged property and all proceeds thereof which may come into" the court. In August, 1858, the receiver entered into a contract with V., which was approved by plaintiffs' attorneys, by which V. released to the receiver the said rolling stock, and it was agreed that, in case it should be finally determined that said property belonged "absolutely and beneficially" to V., he should be paid \$18,000 for the release, and that the same should be a first lien upon the mortgaged property. The receiver continued in possession of the mortgaged property operating the road, apparently in the interest of the purchasers, and using the property purchased of V. until 1868. In August of that year the sale under the interlocutory judgment was completed by a conveyance to the purchasers, in which the property claimed by V. was excepted, but the receiver executed a transfer of his title and interest and turned over said property to a new corporation organized by the purchasers to take the title and to operate the road; and it was thereafter used on the road. The consideration for the conveyance was paid almost wholly by the surrender of bonds. The claim of V., was by the final judgment in the foreclosure suit, determined in his favor, subject to the right of redemption, if any existed. In an action by V. to enforce an alleged lien upon the road given by the agreement with the receiver of August, 1858, *held*, that the order of March, 1858, was valid and binding upon the parties to the foreclosure

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suit and upon the bondholders, the purchasers on the foreclosure sale; as, when it was made, title had not passed under said sale; that said purchasers by their conduct and delay acquiesced in the operation and management of the road by the receiver in the usual way; that the lien authorized by said order was not simply upon the proceeds of the sale, but upon the *corpus* of the property, and, as there were no such proceeds to which the lien could attach or be transferred, it remained attached to the property and followed it into the hands of the purchasers and all subsequent assignees chargeable with notice thereof; that the agreement with V. was authorized by said order; that the determination referred to therein was of the issue raised in the foreclosure suit, and its decision in his favor entitled him to payment of the stipulated price and to a lien therefor on the mortgaged property.

The order of March, 1858, was duly made at Special Term, with a direction that it be entered by the clerk. It was duly filed in the proper clerk's office and the date of filing indorsed thereon by the clerk, but, through mistake on his part, it was not transcribed on the records. *Held*, that the order became effective as an authority to the receiver upon its being filed, and the authority was not affected by the omission of the clerk to enter it.

In September, 1867, the holders of the first mortgage bonds entered into a contract with P. and others for the purpose of organizing a new corporation, by which they transferred said bonds to P. and his associates, and agreed to organize the new company, and that it should acquire title to all the property of its predecessor, subject to the claim of V., "if any shall finally be adjudged;" and to pay any floating debts incurred by the receiver "which constitute any lien upon the railroad." The purchasers agreed to assume and prosecute the litigation against V. and in case of any recovery in his favor to indemnify the sellers and the receiver against the same. *Held*, that said agreement imposed no personal liability upon P. and his associates to V.; and that a personal judgment in his favor against them was unauthorized.

Also, *held*, that the costs adjudged in favor of V. in the foreclosure suit were not included in his agreement with the receiver and could not be charged as a lien upon the property.

A court of equity, having possession in a foreclosure suit of the property of a railroad company, has jurisdiction to authorize the creation of debts for rolling stock and other purposes, when, in its opinion, it is necessary so to do to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property.

The court is not divested of its power and duty of managing the property by reason of a sale which the purchasers delay or neglect for many years to complete.

(Argued May 21, 1887; decided October 4, 1887.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 2, 1883, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose an alleged lien upon certain railroad property and to charge certain of the defendants individually with the indebtedness, the subject of said lien.

The facts, as found by the court, are substantially as follows :

The Plattsburgh and Montreal Railroad Company was organized on the 28th day of March, 1850, under the general railroad act of 1848. It issued bonds amounting to \$400,000, secured by two mortgages to the same trustees for \$200,000 each. In October, 1856, suit was brought by the trustees, and one of the first mortgage bondholders for the foreclosure of these mortgages. Plaintiffs intestate, Samuel F. Vilas, and the defendant, the Plattsburgh and Montreal Railroad Company, were made parties defendant. Before the commencement of the foreclosure suit divers judgments had been recovered against the said company, among which was one in favor of Vilas, recovered April 10, 1854, for \$19,828.23. Executions were issued on these judgments. Vilas at that time was a director of the company. He was requested to bid off the property that might be sold in the interest of the company, but he declined so to do, and informed the officers of the company before the sale that he should bid in his own interest, and he afterward bid in certain rolling stock and other property of the company. With the avails of these sales the sheriff satisfied all the judgments and executions against the company, except that in favor of Vilas, and there was applied upon that, May 20, 1854, \$1,890.25, and the execution in favor of said Vilas was returned unsatisfied as to the balance. On the 8th day of April, 1854, Vilas leased the greater part of the property bid in by him to the said company. This lease continued until February, 1855, when the company leased its road to Edward V. Price,

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who also leased from Vilas the rolling stock bid off by him, and this lease continued until the railroad and property of the company went into the hands of a receiver. Vilas put in an answer in the foreclosure suit, setting up his title under the judgment and execution sales, alleging, among other things, that the mortgages in question had never been filed as chattel mortgages, and claiming to hold the rolling stock and other personal property purchased by him at sheriff's sale, as his own, free and clear of and from all lien of said mortgages; but consenting that judgment might be entered in that action for the foreclosure of the mortgages and the sale of the railroad and fixtures. An interlocutory judgment was entered February 28, 1857, adjudging that the railroad and equipments other than the rolling stock and personal property claimed by Vilas in his answer, be sold, and referring the issues formed by the answer of Vilas. A sale was made under said judgment September 24, 1857. The property was bid off by a committee of the first mortgage bondholders. Moss K. Platt was appointed as receiver of the said company in the said foreclosure suit in 1857. From the time of his appointment until May 1, 1858, the receiver rented of Vilas a portion of the property bid off by him as aforesaid. On March 10, 1858, upon the application of the plaintiffs, on petition of the receiver in the action referred to, the court made an order authorizing the receiver to purchase the necessary rolling stock for the railroad, provided he could make such purchase for a sum not exceeding \$27,500, and upon a credit of not less than six months, and provided also that such purchase should be approved by the plaintiffs or their attorney, and also providing, among other things, that the amount which the receiver might contract to pay for such rolling stock, with all interest that might accrue thereon, should be the first lien on the mortgaged premises and all the proceeds thereof which might come into court, or should be subject to its disposition or authority. This order was duly granted and indorsed by the justice granting it with a direction to the clerk to enter it in the New York clerk's

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office; it was filed the same day it was made, March 10, 1858, but by mistake of the clerk it was not entered on the records. On the 27th day of August, 1858, the receiver and Vilas entered into a written agreement, entitled in the foreclosure suit, upon which this action is based. This agreement was approved and executed by Henry P. Fessenden, plaintiff's attorney in the said suit. By it Vilas released to the receiver the property so bid off by him and it was thereby mutually agreed "that if it shall finally be determined in or by this or any other action or proceeding that the said property belongs absolutely and beneficially to the said Vilas, he shall be paid for the foregoing release the sum of \$18,000, with interest from the 1st of May last, 1858." The referee, after hearing the evidence and argument, made his report, dated June 16, 1866, by which he found in substance that the mortgages in question, not having been filed as chattel mortgages, were void as to judgment creditors and were not liens upon the property claimed by Vilas, and that the said Vilas owned the same under his purchase and execution sale. The Supreme Court at a Special Term, however, sustained the exceptions of the plaintiffs in that action to this report and ordered judgment for the plaintiffs on the 24th day of January, 1867. Vilas appealed from the Special Term decision to the General Term, and the order of the Special Term was affirmed April 6, 1868.

After the decision at Special Term and before that of the General Term, to wit, on September 13, 1867, an agreement was made between Timothy Hoyle and Moss K. Platt and Michael J. Myers, being the owners of first mortgage bonds amounting to \$179,200, as parties of the first part, and the defendants, John B. Page, Peter Butler and George B. Chase, together with one Oakes Ames, as parties of the second part. By this agreement the parties of the first part agreed to organize a corporation for the operation of the Plattsburgh and Montreal Railroad by such name as might be requested by the parties of the second part, and sold their bonds to the parties of the second part for the sum of \$300,000. This agreement con-

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tained the following clause: "They (the parties of the first part) are to pay or cause to be paid, the costs in the Vilas branch of that suit, and in that branch they are to pay the plaintiff's costs to this date. The purchasers are to assume the conduct and prosecution of that suit and to abide its result and judgment, and if there shall be any recovery in said Vilas' favor, the purchasers agree to indemnify the said parties of the first part and said Platt, as receiver, against the same." Before the making of this agreement the defendant Paige, acting for himself and the defendants Butler and Chase, and for Oakes Ames, had actual knowledge of the agreement of August 27, 1858, between the receiver and Vilas. On July 7, 1868, the said Page, Butler and other parties of the second part in the above-mentioned agreement, executed their power of attorney, appointing Michael J. Myers, Timothy Hoyle and Richard M. Blatchford, their attorneys and committee, to receive and take from the referee, who made the sale, in their names and in trust for them, the deed of conveyance of the property sold under foreclosure sale, and thereupon to reconvey the same to such person, persons or corporation as they might request. On the 31st day of July, 1868, upon the petition of Michael J. Myers and Timothy Hoyle, an order was made in the foreclosure suit, directing a conveyance by the referee to the said Blatchford, Myers and Hoyle, in trust for the first mortgage bondholders, Page, Butler and others, of the property, rights and franchises described and referred to in the two mortgages. On the 20th day of August, 1868, articles of association of the Plattsburgh and Montreal Railroad Company were signed, among others, by Moss K. Platt, Timothy Hoyle and Michael J. Myers, and by the defendants John B. Page, George B. Chase and Peter Butler. On the same day Henry J. Scudder, referee, executed a conveyance of the premises covered by the mortgages to said Blatchford, Myers and Hoyle, in trust for holders of bonds secured by the first mortgage. This deed refers to the answer of Vilas and to his claim to own certain of the rolling stock and equipments, which are excepted from

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the conveyance. On the 25th day of September, 1868, said Moss Platt, Michael J. Myers, Timothy Hoyle and Smith M. Weed, executed a bill of sale to the Montreal and Plattsburgh Railroad Company of all their right, title, interest, etc., in and to the property claimed by Vilas, which bill of sale contains the following clause: "Nothing herein to effect or impair any of the covenants in a certain agreement bearing date the 13th day of September, 1867, by which John B. Page and others are to prosecute the case with said Samuel F. Vilas and abide its result." The said Blatchford, Myers and Hoyle, by deed dated August 20, 1868 but not completely executed until the 12th of July, 1869, at the request of defendant John B. Page and his associates, conveyed the mortgaged property to the Montreal and Plattsburgh Railroad Company. This deed also referred to the answer of said Vilas and his claim to a portion of the railroad equipments, which were excepted from the conveyance. Said Vilas appealed from the General Term decision against him to the Court of Appeals; that court reversed the orders of General and Special Terms, and affirmed the decision of the referee. (54 N. Y. 314.) On the 25th day of February, 1873, the said Montreal and Plattsburgh Railroad Company, by an agreement made under the act authorizing the consolidation of railroad companies, passed May 20, 1869, became consolidated with certain other railroad companies, and became and is now a part of the defendant, the New York and Canada Railroad Company, which consolidated company was, by the terms of said agreement to possess all the rights and privileges, and to be subject to the like duties and responsibilities provided by said act; and this agreement of consolidation was duly ratified. On the 10th day of December, 1872, the defendant, the Delaware and Hudson Canal Company, purchased of the defendants, John B. Page and others, the greater part of the stock of the Montreal and Plattsburgh Railroad Company, and is now in possession of the roads of the said consolidated company, the defendant, the New York and Canada Company, under an agreement for a perpetual lease of the same.

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Vilas, upon the faith of his agreement with the receiver of August 27, 1858, and the order of March 10, 1858, relinquished and gave up to the receiver the rolling stock and other property mentioned in said agreement; all this property remained in the possession of the said receiver until the organization of the Montreal and Plattsburgh Railroad Company, and was then by the receiver delivered to the said company, and has ever since, except so much as has been worn out, destroyed or disposed of, been in the possession of the Montreal and Plattsburgh Railroad Company, or the New York and Canada Railroad Company, or the Delaware and Hudson Canal Company, and said Vilas has had no benefit therefrom since the date of said agreement, nor has he received any part of the purchase-price thereof.

Judgment was rendered herein against the defendants, Page, Butler and Chase, for \$52,803.73, damages and costs, and declaring the same a first lien on the railroad premises in question and directing a sale thereof.

Peter B. Olney for Peter Butler, appellant. The latter portion of the agreement of September 13, 1867, is merely an agreement of indemnity, pure and simple. There can be no breach of it or liability on the part of the purchasers till the vendors have actually suffered harm or damage. (*Gilbert v. Wiman*, 1 N. Y. 550, 561; *Turk v. Ridge*, 41 id. 201; *Belloni v. Freeborn*, 63 id. 384, 390; *Kohler v. Matlage*, 72 id. 259, 266.) The agreement of Butler and associates to abide the result of such judgment as this, and to indemnify the vendors against such a recovery of Vilas did not make them personally liable to Vilas for the price or value of his rolling stock fixed by him and the receiver. (*Belmont v. Coman*, 22 N. Y. 438, 439, 440; *Ricard v. Sanderson*, 41 id. 180; *Dingledein v. Third Ave. R. R. Co.*, 34 id. 575; *Vrooman v. Turner*, 69 id. 280; *Carter v. Holahan*, 92 id. 498.) As Butler and his associates had no actual knowledge or notice of the agreement of August 27, 1858, they are not chargeable with such knowledge and notice.

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(*Williamson v. Brown*, 15 N. Y. 362; *Reed v. Gannon*, 50 id. 345.) Without the consent of all the purchasers together, to put a mortgage lien upon the property bought by purchasers at the foreclosure sale, the court could not create such a lien. (*Harmon v. Hope*, 87 N. Y. 13.) By his acts Vilas waived all claims, if any he had, under the agreement of August, 1858. (*Cobb v. Hatfield*, 46 N. Y. 533, 536; *Mills v. Hoffman*, 92 id. 181, 189; *Gould v. Cayuga Bk.*, 86 id. 75, 79; *Baird v. Mayor, etc.* 96 id. 599; *Branch v. Jessup*, 106 U. S. 468, 475, 476.)

Alfred R. Page for Richard J. Morrison, administrator, etc., appellant. The alleged order of March 10, 1858, was invalid and ineffectual to confer any rights until it was entered. (*Whittiker v. Defosse*, 7 Bosw. 678; *Star F. Ins. Co. v. Godet*, 34 J. & S. 366; *Stafford v. Ahlbe*, 8 Abb. [N. C.] 240; *Newhouse v. Weimert*, Ct. of App.; *Scudder v. Snow*, 29 How. Pr. 96; R. S. pt. 2, Ch. 3, § 24.) The agreement between the receiver and Vilas did not follow and was not authorized by the order. The court had no power to establish and did not authorize a lien upon the property as against the purchasers. (*Lehigh C. & N. Co. v. N. J. Cent. R. R. Co.*, 35 N. J. Eq. 430; *Chicago v. Sheldon*, 9 Wall. 55; *Met. T. Co. v. T. V. & C. R. R. Co.*, 103 N. Y. 249; *Raht v. Attrill*, 42 Hun, 414; *Wallace v. Loomis*, 97 U. S. 146; *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 310.) Nothing is owing Vilas under the terms of the contract of August 27, 1858, he not having established his "absolute and beneficial ownership" of the property. (*Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 328, 330; *Cumberland Coal Co. v. Sherman*, 30 Barb. 568; *Benson v. Heathorn*, 1 Y. & Col. 326; *Davoue v. Fanning*, 2 John. Ch. 25; *Gardner v. Ogden*, 22 N. Y. 327; *Butts v. Woods*, 37 id. 317; *Hubbell v. Medbury*, 53 id. 98; *Fulton v. Whitney*, 66 id. 548; *Munson v. S. G. & C. R. R. Co.*, 103 id. 58.) The personal judgment against Page and his associates was error, as there is nothing in the case to support it. (*Laurence v. Fox*, 20 N. Y. 268; *Ætna*

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(Code of Procedure, § 97; *Hubbell v. Sibley*, 5 Lans. 51, 58; 50 N. Y. 468; *Tibbs v. Morris*, 44 Barb. 146; *Peabody v. Roberts*, 47 id. 102; *Bruce v. Tillson*, 25 N. Y. 194; *Cleveland v. Boerum*, 24 id. 613, 617; 54 id. 330; *Duncomb v. N. Y., H. & N. R. R. Co.*, 84 id. 190, 199.) The contract of August 27, 1858, created a valid first lien upon the mortgaged premises, in favor of Vilas, for the \$18,000 and interest. (*People v. Cent. City Bk.*, 53 Barb. 412; *Wallace v. Loomis*, 97 U. S. 146; *U. Tr. Co. v. Ill. Mid. Co.*, 117 id. 434, 454, 455; *Jerome v. McCartee*, 94 id. 734, 738; *New v. Nichol*, 73 N. Y. 127, 131.) The purchase-price agreed upon between Mr. Vilas and the receiver, is a valid and subsisting lien on the mortgaged property, and none of the defendants are entitled to protection as purchasers in good faith without notice. (*Schafer v. Reilly*, 50 N. Y. 61; *Bush v. Lathrop*, 22 id. 535; *Fairbanks v. Sargeant*, 9 East. R. 207, Laws of 1869, chap. 917, § 5; *Reed v. Gannon*, 50 N. Y. 345, 350.) The defendants Page, Butler and Chase were properly made personally liable for the amount due Vilas under his contract. (*Burr v. Beers*, 27 N. Y. 178; *Curtis v. Tyler*, 9 Paige, 42.) The defendants are privies to the foreclosure suit, and to all the proceedings therein, and are bound by such proceedings, including the order of March 8, 1858, and the final judgment in favor of Vilas as if they had actually been parties thereto. (*Goddard v. Benson*, 15 Abb. 191; *Bennett v. Couchman*, 48 Barb. 73, 81-83; *Jenkins v. Fahey*, 32 N. Y. 353; *Manolt v. Petri*, 65 How. 206; *Adams v. Barnes*, 17 Mass. 365; *Campbell v. Hall*, 16 N. Y. 578, 579.)

ANDREWS, J. The validity of the order of March 10, 1858, lies at the basis of the lien claimed by the plaintiff under the agreement of August 27, 1858. The receiver had no power, as incident to his general authority as receiver, to create a lien on the property of the railroad company for the purchase of rolling stock. The jurisdiction of the court to appoint receivers of property has for its primary object the care and custody of the property which is the subject of the receiver-

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ship, pending the determination of the questions involved in the litigation, and to enable the court, by placing the property under the control of its officer, to preserve it to answer the final decree which may be made in the action. But the receiver cannot of his own motion contract debts chargeable upon the fund in litigation. The court must authorize expenditures on account of the property before they can be charged thereon; and while it may, and does in its discretion, allow expenses incurred by a receiver strictly for preservation to be charged upon the fund, although incurred without the prior sanction of the court, it is, nevertheless, the order of the court and not the act of the receiver which creates the charge and upon which its validity depends.

The order of March 10, 1858, authorized the receiver to expend not exceeding \$27,500 in the purchase of necessary rolling stock for the Plattsburgh and Montreal Railroad, upon a credit of not less than six months, provided the purchase should be approved by the plaintiffs or their attorney, and directed that the purchase-money of the mortgaged premises directed to be sold by the interlocutory decree of February 28, 1857, should be applied by the referee, first to the payment of his own costs and disbursements, and next to paying for the rolling stock which might be purchased by the receiver; and, further, that the "amount which the said receiver may so contract to pay for the rolling stock, with all interest that may accrue thereon, is hereby made a first lien on the said mortgaged premises, and all proceeds thereof which may come into this court, or are, or shall become subject to its disposition or authority." The order was granted upon the petition of the receiver, supported by the affidavit of the attorney for the plaintiffs in the action, which, among other things, represented that the rolling stock then in use had been hired by the receiver and was very scanty and inadequate to the proper working of the road.

The jurisdiction of a court of equity, having possession in a foreclosure action, through its receiver, of the property of a railroad company, to authorize the creation of debts for rolling

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stock and other purposes, when in its opinion it is necessary so to do to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property, has of late years been the subject of consideration by the courts, and the doctrine that this jurisdiction appertains to the power of the court to appoint receivers is now firmly established. (*Wallace v. Loomis*, 97 U. S. 146; *Union Trust Co. v. Ill. Midland R. R. Co.*, 117 id. 434; *Woodruff v. Erie Railway Co.*, 93 N. Y. 609.) The order of March 10, 1858, was therefore a lawful exercise of the power vested in the court, and was binding upon the parties to the action, even if it had been made without their consent. But it was procured on the application of the receiver who represented the company in making the application, and of the plaintiffs, the trustees in the mortgages sought to be foreclosed, who with the individual co-plaintiff represented the bondholders, and neither the company nor the bondholders can assail its validity.

But it is insisted, on behalf of the grantees of the purchaser on the foreclosure sale, that, inasmuch as the order of March 10, 1858, was made after the sale under the foreclosure judgment, the court could not create a lien on the property purchased, without the consent of the purchasers, and that the purchasers, on completing their purchase, had the right to demand and receive a title subject only to such liens, if any, paramount to the mortgages foreclosed, as existed on the property at the time of the sale. The sale on the interlocutory judgment was made September 24, 1857, several months prior to the order in question. The property was bid off by a purchasing committee, representing nearly all the bondholders under the first mortgage, for the sum of \$150,000, a sum much less than the amount of the mortgage. It does not appear with certainty that any payment was made at the time on account of the purchase. If any was made it did not exceed a few hundred dollars. In July, 1858, the referee made his report of sale, which was confirmed July 31, 1858, and this was followed August 20, 1868, by a conveyance

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from the referee to the purchaser, which recites the sale of September 24, 1857, for the sum of \$150,000. The consideration, however, was paid almost wholly by the surrender of bonds held by the purchasers. Meanwhile, from 1857 to 1868, a period of eleven years, the receiver remained in possession and operated the railroad without objection and apparently in the interest of the purchasers. During this time the order of March 10, 1858, was made, and on August 27, 1858, the receiver entered into the contract with the plaintiff Vilas, which has given rise to this controversy. The rolling stock purchased of Vilas was used by the receiver in operating the road up to the time of the conveyance to the purchasers on the foreclosure sale, and what remained was received by them and was used on the road down to the time of trial. The claim made that the purchasers on the foreclosure are not bound by the order of March 10, 1858, has no foundation in law or equity. When the order was made the title had not passed under the foreclosure sale. The sale of September 24, 1857, was afterwards vacated and the road was advertised for resale under the decree in 1863, but was not again sold, and for some reason not disclosed, the order vacating the original sale was itself set aside and a conveyance finally made pursuant thereto. The rolling stock authorized to be purchased by the order of March 10, 1858, would on its purchase belong to the estate owned by the mortgagor, out of which the purchase-money was to be paid. The purchasers by their conduct and delay acquiesced in the operation and management of the road by the receiver in the usual way. The court was not divested of its power and duty of managing the property by reason of a sale which the purchasers delayed or neglected for many years to complete. If the court after a sale, and before completion, had made an inequitable or improvident order injurious to purchasers, it would present a ground on which to base an application by them to be released from the purchase. The purchasers in this case have no equity to be relieved from the just operation of the order in question.

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There is another question raised by the appellants which it is proper to consider before considering the questions arising upon the agreement of August 27, 1858. It is claimed that the lien, authorized by the order of March 10, 1858, was upon the proceeds of the sale of the mortgaged property only, or at least that upon the completion of the sale and the conveyance of the property pursuant thereto, the lien was transferred to the proceeds and that the remedy, if any, to enforce the lien was against the proceeds only and could not be pursued against the property which was the subject of the sale. There can be no doubt of the general principle that assets derived from the sale of mortgaged property on the mortgage become, as regards creditors, the substitute for the things sold, and that the claims of creditors are transferred by the sale to the fund, and that the purchaser takes the land freed from the claims of general creditors. (*Railroad Co. v. Howard*, 7 Wall. 392.) But this case is not within this principle. It cannot be disputed that it was the intention of the court, by the order of March 10, 1858, to authorize a lien to be created on the *corpus* of the property for the price of the rolling stock which should be purchased by the receiver. The language of the order permits no other construction. The words are that the purchase-price "is hereby made a first lien on the said mortgaged premises." It is also true that it was made a lien "on all proceeds which may come into this court, or are or shall be subject to its disposition or authority," and the order authorized the referee to pay the debt which might be contracted for rolling stock out of the purchase-money. When the order was made the property had been sold, but the purchase-money had not been paid and it was uncertain whether the sale would be completed. In fact the purchase-money was never paid beyond a trifling amount, except constructively by the purchasers canceling bonds secured by the mortgage. There were no proceeds of the sale received by the referee or which came into his possession or under the control of the court. If the purchasers on the sale, whether bondholders or third persons, had paid the purchase-money

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in cash or secured its payment, there would, we conceive, be no doubt that the lien would be transferred to the proceeds. There would then be a substitute for the thing sold, upon which the lien would attach, relieving the land in the hands of the purchasers. But it could not have been the intention of the court to make a constructive payment on a purchase by the mortgagees, through a cancellation of the mortgage debt, equivalent to an actual payment, so as to relieve the property from the charge. Such a lien would be illusory merely, having no substantial quality. The purchasers cannot claim to have the premises purchased discharged from the lien, and whether the present holders of the property stand in any better position will be considered hereafter.

The final objection to the order of March 10, 1858, as constituting a basis for a lien, rests upon the conceded fact that it was never entered by the clerk in the records of the court until after the commencement of this action. It was duly made at Special Term and allowed by the court, and at the foot of the order was a direction that it should be entered, made by the judge by whom the order was granted. The order was duly filed in the proper clerk's office on the day of its date, and the clerk indorsed thereon the date of the filing. But by mistake of the clerk it was not at the time transcribed in the records. We are of opinion that the order became effective as an authority to the receiver upon its being filed with the clerk, and that the mistake of the clerk cannot, on the one hand, operate to the prejudice of parties dealing with the receiver in reliance upon the order, or, on the other, furnish a defense to other persons which they would not have had if the order had been promptly recorded.

The principal question upon the agreement of August 27, 1858, arises upon the clause which provides "that if it shall be finally determined in and by this or any other action or proceeding that the said property belongs absolutely and beneficially to the said Vilas, he shall be paid for the foregoing release the sum of eighteen thousand dollars, with interest from the first day of May last." It is claimed, on the one

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hand, that the final adjudication in the Court of Appeals in 1873, in the Vilas branch of the foreclosure action, that the mortgages were not at the time of the sale and purchase by Vilas in April and May, 1854, of the rolling stock and other personal property of the Plattsburgh and Montreal Railroad Company, upon execution against the Company, liens or incumbrances thereon as against the judgments and executions upon which it was sold; and "that the legal title to said rolling stock and personal property mentioned in the answer of the said defendant Vilas became vested in him on the purchase thereof, as mentioned in said answer," with the reservation "that this judgment be without prejudice to any equity of redemption which the plaintiffs had, if any, at the time of commencing the action," was an adjudication that the property belonged "absolutely and beneficially" to Vilas, within the true meaning of the contract. On the other hand, it is insisted by the defendants that the judgment itself recognized the possible existence of an outstanding equity in the plaintiffs in the foreclosure action to redeem from the sales on the executions, and that the conceded fact that Vilas, at the time of his purchase on the execution sales, was a director of the Plattsburgh and Montreal Railroad Company, the defendant in the executions, brings his title within the rule in equity that one occupying a fiduciary relation cannot purchase for his own use, and hold absolutely against the *cestui que trust*, the trust estate. There was, therefore, it is claimed upon the conceded facts, an outstanding equity of redemption which could be enforced either by the company or its mortgagees; or, at all events, the facts raised a question as to the character of Vilas' title, which has not been finally determined, and, therefore, the condition upon which the liability to pay the \$18,000, under the agreement of August 27, 1858, has never been fulfilled. Before coming to this main question there is a preliminary question made by the appellants that the agreement was not authorized by the order of March 10, 1858. The order was that the purchase-money of the rolling stock should be a lien upon the "mortgaged prem-

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ises, and all proceeds thereof." The contract provided that it should be a lien on the "mortgaged premises" sold by the referee and that the purchasers should give a mortgage therefor. The point is that the order authorized a lien on the proceeds, while the contract provided for a lien on the mortgaged property. It is to be observed that the provision in the order for a lien was for the protection of persons who might be willing to sell rolling stock to the receiver. The order authorized a lien both on the property and its proceeds, which, on the payment of the sum bid on the foreclosure, would be transferred to the proceeds of the sale in exoneration of the property. Before the order and contract were made the road had been sold on the foreclosure, but the purchasers had not paid their bid. If, in the litigation with Vilas, his title to the rolling stock should be defeated, or be held subordinate to the lien of the mortgagees, nothing would become due to him under the contract. It might happen, however, indeed it was probable, that before this litigation was determined the purchasers on the foreclosure sale would be ready to complete their purchase. The contract, therefore, provided for a lien on the mortgaged property and a reservation by the purchasers on the foreclosure, out of the purchase-money of a sum sufficient to pay the amount "which may become due to Vilas under and by virtue of this agreement," and that the purchasers should give him a mortgage therefor. This arrangement was, we think, within the scope of the authority conferred by the order of March 10, 1858. It charged both the property and the proceeds with the lien and secured the ultimate payment out of the proceeds, if a right thereto should be established.

Returning, therefore, to the question of the construction of the clause in the agreement of August 27, 1858, already quoted, with a view of ascertaining whether the judgment of the Court of Appeals in 1873 fulfilled the condition of the agreement and finally determined "that the said property belongs absolutely and beneficially to the said Vilas," it is important to consider the extrinsic circumstances which are often persuasive elements of interpretation. The agreement

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was entitled in the foreclosure action. The complaint in that action alleges that Vilas and other defendants had or claimed some interest in the mortgaged property, but which, as the plaintiffs averred, was subordinate to the lien of the mortgages. Vilas, in his answer, set up his title as purchaser of rolling stock and personal property of the Plattsburgh and Montreal Railroad Company under the execution sale in 1854, and that the plaintiffs' mortgages were not liens on the rolling stock and property so purchased by him, and also that the mortgages, not having been filed as chattel mortgages, were void as against the creditors in the executions and the sale thereunder. The interlocutory judgment of February 28, 1857, expressly reserved from the sale to be made thereunder the property claimed by Vilas, and as to that it directed that it be referred to the referee to "inquire and report as to the issues raised in this action between the plaintiffs and the defendant Samuel F. Vilas, and whether or not the locomotive engines, tenders, cars and any other personal property in the answer of the said defendant Vilas mentioned, or any or what part or parts thereof are or is subject to the lien of the said two mortgages and either and which of the same." The only issue raised by the pleadings in the Vilas branch of the litigation and the only issue which was referred, related exclusively to the questions, *first*, whether the mortgages covered the property in question, and *next*, whether the omission to file them as chattel mortgages rendered them void as against creditors. Up to the time of the agreement of August 27, 1858, the question, so far as appears, had never been mooted by any one, neither by the company, the mortgagees, the bondholders, or the receiver, that the title of Vilas under his purchase was redeemable by reason of his relation as director of the company. The company had apparently acquiesced in the validity of his title by renting the property for the use of the road immediately after his purchase. Subsequently its lessee hired the rolling stock from Vilas, and the receiver on his appointment February 21, 1857, also leased from Vilas the portion then owned by him, and was using it on the road as

lessee when the agreement of August 27, 1858, was made. It is material in determining the construction of the agreement to take into view the situation as between the mortgagees and Vilas created by the purchase by Vilas under the executions in 1854. Vilas, by his purchase, acquired the legal title to the property. This was decided by the Commission of Appeals in the foreclosure action. (*Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 314.) Whether his title was subject to or free from the lien of mortgages depended (as to all the property except four platform cars purchased by the company after the mortgages had been executed), upon the question whether they were subject to the provisions of the chattel mortgage act requiring chattel mortgages to be filed in the town clerk's office to make them valid as against creditors. As between the company and the mortgagees, the mortgages were valid although not filed. When the agreement of August 27, 1858, was made the question whether the title of Vilas was "absolute and beneficial," in the sense that it was paramount to the mortgages or was subject and subordinate to the mortgage lien was a controverted, but, as yet, an undecided, question. The question was decided in 1873, adversely to the mortgagees, in the case referred to. The courts below have held that the language of the agreement had reference to this situation, and not to a possible right of redemption, which, so far as appears, was not at the time in the minds of any of the parties. There are other considerations which confirm this construction of the agreement. The right of redemption, if it had existed, was valueless provided the company or mortgagees in exercising it would be required to pay not only the purchase-money paid by Vilas on the purchase of the property, but his debt against the company, for which he obtained judgment a few days after the sale. Vilas, in making the purchase openly, acted in his own interest and refused to buy in for the benefit of the company, which, as the case shows, was then insolvent. The construction of the agreement claimed in behalf of the appellants, that the condition that the title shall be determined to be "absolutely and beneficially" in Vilas, requires that it

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should be determined not only that his title was not subject to the mortgages, which was substantially the only issue in the action, but also that it was not subject to redemption, if sustained, places Vilas in the position of abandoning all claim for compensation if it should be held that there was an outstanding equity to redeem from the sale, although he might on redemption, except for this agreement, have been equitably entitled to the payment of his debt as a condition to the avoidance of his title. This is distinctly insisted upon in the brief of one of the counsel. He says: "There can be no question of terms of redemption; the terms are fixed by the contract, \$18,000 if Vilas establishes his absolute and beneficial ownership; if not, nothing." It is difficult to suppose that this could have been the intention of the parties to the instrument. The meaning of the clause in question is further indicated by the provision in the contract that if it should be finally determined that Vilas is entitled "to a part, but not to the whole of said property," a proportionate share of the purchase-price only should be paid. If the parties had in view the question of redemption, it is difficult to assign a reason for this provision, as either the whole or none of the property was redeemable. If the clause relating to the "absolute and beneficial" title referred to the title of Vilas as against the mortgagees, the second clause referred to is significant, since it might be held that although the title of Vilas was subject to the mortgages, nevertheless that the mortgage lien did not cover the four platform cars purchased by the company after the mortgages were executed, which were included in Vilas' purchase and were transferred by the agreement to the receiver. The provision reserving the question of rents, saved to the mortgagees and the receiver the right to claim the benefit of rents paid after the receiver took possession under the mortgages, to which the mortgagees would be entitled if the lien of the mortgages was paramount to the title of Vilas. The agreement of August 27, 1858, moreover, contemplated that the determination referred to might be had in the foreclosure action. The right of redemption could not be determined

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under the issue presented in that action. The subsequent words, "or any other action or proceeding," were probably inserted to provide against the contingency of a discontinuance of the foreclosure action. The question of construction is by no means free from difficulty, but we are of opinion that reading the contract in the light of the circumstances, the clause in question referred to a determination of the issue raised in the foreclosure action, and that the judgment of the Court of Appeals, adjudging that Vilas acquired by his purchase the legal title to the rolling stock, which was paramount to the lien of the mortgages, satisfied the condition of the contract and entitled him to payment of the stipulated price and a lien therefor on the mortgaged property.

But it is insisted that the equitable lien, if it existed before the conveyance of the property on the foreclosure sale, cannot be enforced against the present owners, for the reason that they and their grantors were purchasers in good faith for value, without notice, and are therefore entitled to protection under the general rule of law. The sale in the foreclosure action, made September 24, 1857, as has been stated, was not completed by a conveyance until August 20, 1868. On that day the referee, pursuant to the order of the court, conveyed the mortgaged property to the committee of bondholders who were the purchasers on the sale, for the expressed consideration of \$150,000, in which conveyance the plaintiffs in the foreclosure action, the trustees under the mortgage, joined. On the same day (August 20, 1868), the purchasing committee, the grantees in the referee's deed, conveyed the same property to the defendant, the Montreal and Plattsburgh Railroad Company, a new corporation organized to take the title to the property. Subsequently the defendant, the Delaware and Hudson Canal Company, purchased the stock of the Montreal and Plattsburgh Railroad Company. Still later, in 1873, the defendant, the New York and Canada Railroad Company, was organized by the consolidation of several continuous lines of road, under authority of the act, chapter 917 of the Laws of 1869, of which consolidated road the Delaware

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and Hudson Canal Company is lessee. Neither of the conveyances of August 20, 1858, purported to transfer the property embraced in the Vilas purchase, but, in terms, excluded it therefrom, nor was either conveyance made subject to his claim. The referee could not convey the Vilas property, because it was not embraced in the sale, and the purchasing committee could convey only what they had purchased. But on the 26th of September, 1868, the persons who, on the 13th of September, 1867 (the date of the agreement with Page and others), owned nearly all the bonds of the Plattsburgh and Montreal Railroad Company secured by the first mortgage, together with the receiver Platt and another person (whose interest in the transaction is not disclosed), executed a transfer in writing, under seal, to the Montreal and Plattsburgh Railroad Company, of all their right, title or interest in the locomotives and other property purchased by Vilas at the execution sale in 1854, and this property, purchased by Vilas, embraced in the agreement of August 27, 1858, has followed the road through all transmutations of title, and has been used thereon by the several grantees and lessees thereof so long as it was capable of use. In considering whether along this chain of title there has intervened a purchaser for value, whose title was freed from the equitable lien created by the contract of August 27, 1858, we may dismiss any claim to such exemption on the part of the defendants, the New York and Canada Railroad Company and its lessee the Delaware and Hudson Canal Company, by a reference to the act of 1869, which saves the rights of all creditors and bondholders of any company embraced in this consolidation, authorized by that act. It was the evident purpose of the statute that the existing status of each separate company should, as respects creditors and bondholders, remain unimpaired and unaffected by the consolidation (§ 5). So also, for reasons which have been indicated, the purchasers on the foreclosure do not occupy the position of purchasers for value without notice, and their title, under the referee's deed, was subject to the lien, not for the reason that it was so declared in the conveyance, for, as

has been stated, there was no such declaration, but because the agreement of August 27, 1858, was made by their representatives and of which they also had actual notice. The question is, therefore, narrowed to the consideration of the title of the Montreal and Plattsburgh Railroad Company. That company was organized concurrently with the conveyances of August 20, 1858, for the purpose of taking the title to the property and franchises of its predecessor, the Plattsburgh and Montreal Railroad Company. It was organized pursuant to an agreement made September 13, 1867, between Timothy Hoyle, Michael J. Myers and Moss K. Platt, who were then the owners of \$179,200 in amount of the first mortgage bonds of the Plattsburgh and Montreal Railroad Company, of the first part, and John B. Page and others, of the second part. Without going into detail, it is sufficient to state that in its general scope it was a contract on the one side to sell to Page and his associates the bonds of the road held by them, upon certain considerations therein expressed, with a view on the part of the purchasers, through the ownership of the bonds, to acquire title to the property of the Plattsburgh and Montreal Railroad Company, and to organize a new corporation, to whom the title should be conveyed. This scheme was carried out, and Page and his associates caused the property to be conveyed to the Montreal and Plattsburgh Railroad Company in exchange for its stock. It was found by the learned trial judge that when the agreement of September 13, 1867, was made Page and his associates had actual notice of the order of March 10, 1858, and of the agreement of August 27, 1858, between the receiver and Vilas. It cannot be maintained, we think, that there is no direct evidence, to support the finding. The circumstances also tend to support it. It will be remembered that when the contract of September 13, 1867 was made, Vilas had no claim except under the contract of August 27, 1858. He had released his title to the rolling stock, whatever it was, to the receiver. The property had by the release become a part of the assets of the railroad company, and all that was left to Vilas was the con-

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tingent right under the agreement to be paid the sum of \$18,000. Platt, one of the parties to the agreement of September 13, 1867, was the person who, as receiver, had made the contract with Vilas, and with his co-contractors owned nearly all the first mortgage bonds of the Plattsburgh and Montreal Railroad. By the contract with Page and his associates, the sellers of the bonds agreed that the new corporation should acquire title to all the property of its predecessor, "subject to the claim of S. F. Vilas, hereinafter referred to, if any shall be finally adjudged." By a subsequent clause in the contract the sellers agreed to pay a certain sum to the second mortgage bondholders, and also "the amount due for land damages and claims, and any floating debts incurred by the receiver, which constitute any lien upon the railroad." They also agreed to pay the costs in the foreclosure suit, except in the Vilas branch of that suit, and in that branch to pay the plaintiff's costs to date. The contract then continues, "the purchasers are to assume the conduct and prosecution of that suit and to abide its result and judgment, and if there should be any recovery in said Vilas' favor, the purchasers agree to indemnify said parties of the first part and said Platt, as receiver, against the same." The provision that the purchasers should take "subject to the claim" of Vilas, was, in the actual situation, without meaning, unless it related to the claim which, as the result of the litigation in the Vilas branch of the foreclosure, would be established against the property under the agreement of August 27, 1858. Whatever title Vilas acquired under his purchase on the execution sales, has been released and extinguished by his voluntary act, and he could never reclaim it. Page and his associates were by the agreement to be vested with the title to this as well as the other property of the railroad. They agreed to take subject to Vilas' claim and to abide the result of the foreclosure action. That result, whatever it might be, could not affect their title to the property agreed to be purchased, unless it operated to create a lien in favor of Vilas, under the agreement of August 27, 1858. We think

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there is reasonable ground to infer, as stated in the opinion at Special Term, that the parties to the contract of September 13, 1867, "had reference to an arrangement not disclosed in the pleadings (in the foreclosure action), dependent on the result and judgment in the suit which the purchasers under the agreement agreed to abide." Page and his associates were purchasers of the bonds and, *pro tanto*, of the mortgage security, and took them subject to the equities of third parties. The Montreal and Plattsburgh Railroad Company represented simply the purchasers of the bonds, and paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors. We are, therefore, of opinion that the purchase-price of the rolling stock, fixed by the agreement between Vilas and the receiver, is a valid lien upon the mortgaged property.

The personal judgment awarded against Page and his associates has, we think, no legal foundation. It proceeds on that clause in the agreement of September 13, 1867, by which Page and his associates agreed to "assume the conduct and prosecution of that suit (the Vilas branch), and to abide its result and judgment, and if there shall be any recovery in Vilas' favor, the purchasers agree to indemnify said parties of the first part and said Platt, as receiver, against the same." There is no promise to pay Vilas the amount of his claim, nor was the promise to abide the result of the litigation, or to indemnify the vendors in the contract, made for his benefit, within *Lawrence v. Fox* (20 N. Y. 268), and kindred cases. The agreement to abide by the result of the litigation was intended to protect the vendors against any claim by Page and his associates, in case the title of Vilas to the rolling stock, or his lien on the mortgaged property should be sustained. The latter part of the clause is a contract strictly of indemnity. The vendors have not been damnified, nor is it easy to discover how they ever can be. The agreement of August 27, 1858, expressly exempts the receiver from personal liability for the purchase-price of the rolling stock, and the other vendors, in the agreement of September 13,

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1858, have never, so far as appears, become liable to Vilas or assumed the payment of his debt. The indemnity clause may have been inserted to protect the vendees against a possible award of costs in the litigation of the Vilas claim. But whatever may have been in the contemplation of the parties, it clearly imposed no personal liability upon Page and his associates to Vilas. It is not necessary to determine whether, independently of the agreement of September 13, 1867, any ground exists for charging the defendant Page with the payment of the lien debt. The complaint proceeds exclusively upon his obligation under that agreement.

We are also of opinion that the costs adjudged in favor of Vilas in the foreclosure action are not comprehended in his agreement with the receiver and cannot be charged as a lien upon property in the hands of the present defendant.

Our conclusion is that the personal judgment against the individual defendants should be reversed, with costs against the plaintiff, and that it be modified in respect to charging the costs in the foreclosure action as a lien, and by making the mortgaged property in the hands of the corporations defendant primarily liable; and that, as so modified, the judgment be affirmed, with costs against the corporations defendant.

All concur, except PECKHAM, J., not sitting.

Judgment accordingly.

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WEST PHILADELPHIA BANK, Appellant, v. ALLSTON GERRY,
Impleaded, etc., Respondent.

In 1875 the firm of G. T. & Co., composed of the defendants, executed to plaintiff its promissory note upon which this action was brought, and judgment was recovered in January, 1883, against all of the defendants. In August, 1878, defendant G., then being a resident of Massachusetts, filed his petition in bankruptcy, and in March, 1883, obtained his discharge from all debts and claims provable against his estate which existed on August 3, 1878, save as excepted by the bankrupt act. Before the petition in bankruptcy was filed the firm was dissolved, an assignment of its property made and the assets distributed among creditors. An application made by G. in September, 1886, for a discharge of said judgment of record as against G. was granted. *Held*, that the discharge in bankruptcy covered the judgment; that conceding G. could have obtained from the United States Court a stay of proceedings in this action, he was not bound so to do, and his omission could not deprive him of the benefit of the provision of the Code of Civil Procedure (§ 1268), providing that at any time after the lapse of two years from a bankrupt's discharge he may apply to the court in which a judgment was rendered against him to have it discharged of record, and requiring the court to grant the application "if it appears that he has been discharged from the payment of that judgment;" also, that if the doctrine of *laches* applied, it was for the court below to deal with it, and its decision was not reviewable here.

Medbury v. Swan (46 N. Y. 200) distinguished.

Under the late bankrupt act, in proceedings instituted for his discharge by one member of a firm, upon his individual petition, partnership debts were provable, and he was entitled to be discharged from them, whether there were assets of the firm or not.

It was objected that the judgment was not included in G's schedule in bankruptcy; it appeared that the note upon which the judgment was recovered was set forth. *Held*, that a discharge of the cause of action discharged the judgment.

It seems, the said provision of the Code introduced no new law, but simply conforms with, and was affirmatory of the previous uniform practice of the courts.

(Argued June 7, 1887; decided October 4, 1887.)

APPEAL from the order of the General Term of the Supreme Court in the first judicial department made January 22, 1887, which affirmed an order of Special Term, granting a motion

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on the part of defendant Gerry, directing that the judgment herein be canceled and discharged of record as against him.

The material facts are stated in the opinion.

James Armstrong for appellant. The defendant Gerry was guilty of laches in not applying for a stay. (*Medbury v. Swan*, 46 N. Y. 200; *Valkenburgh v. Dederick*, 1 Johns. Cas. 133; *Cross v. Hobson*, 2 Caine's Cas. 102.) A discharge in bankruptcy of a single member of a copartnership does not act as a discharge of copartnership debts if there are assets of the firm unless the firm is declared bankrupt. (*In re Little*, 1 Nat. Bk. Reg. 343; *In re Noonan*, 10 id. 334; *Hudgins v. Lane*, 11 id. 462; *Compton v. Conkling, Jr.*, 15 id. 417; *Corey v. Perry*, 17 id. 147; *In re Plumb*, id. 76.) No member of a firm owing copartnership debts can be discharged if there are firm assets, unless the firm is declared bankrupt. He cannot be discharged of his individual liabilities, leaving him liable for his copartnership debts, for he must be discharged of all or none. (*In re Grady*, 111 Nat. Bk. Rep. 229; *In re Morritz & Periner*, 5 L. R. 539.) The order appealed from was improperly granted, as the moving party did not bring himself within the provisions of section 1268 of the Code of Civil Procedure. (*Clark v. Rowling*, 3 N. Y. 216; *Monroe v. Upton*, 50 id. 593; Laws of 1875, chap. 52, Code of Civ. Pro., § 1268.)

Robert Payne for respondent. If it appeared that Allston Gerry has been discharged from the payment of the judgment, this court "must" make an order accordingly, and the clerk "must" cancel and discharge the docket thereof. (Code of Civ. Proc., § 1268.) The debt, being the note on which the judgment was based, was due and payable from Gerry's firm, from him individually, and existed at the time of the commencement of his proceedings in bankruptcy, and was, therefore, provable against his estate in bankruptcy. (U. S. R. S., § 5067.) The certificate of discharge in bankruptcy is conclusive evidence in favor of the bankrupt of the fact and regularity of such discharge, and cannot be impeached in a

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State court on the ground that it was improperly granted. (*Ocean Bk. v. Olcott*, 46 N. Y. 12.) The recovery of the judgment on January 10, 1883, on the note in question, does not prevent the operation of the discharge on the plaintiff's claim. (*Clark v. Rowling*, 3 N. Y. 216; *Monroe v. Upton*, 50 id. 593; *Medbury v. Swan*, 46 id. 200; *Valkenburgh v. Dederick*, 1 Johns. Cas. 134; *Cross v. Hobson*, 2 Caine's Cas. 102.) The District Courts of the United States are not courts of inferior jurisdiction in the sense that renders it necessary to show their jurisdiction on the face of their records. Their jurisdiction is presumed until the contrary is shown. (*McCormick v. Sullivan*, 10 Wheat. 192; *Ex parte Watkins*, 3 Peters, 193; *Ruckman v. Cowell*, 1 N. Y. 505; *Chemung Bk. v. Judson*, 8 id. 254.) Where there are no partnership assets to be administered (under the bankrupt law), a member of a late partnership may, upon his individual petition, be discharged from all his debts, partnership as well as individual. (*In re Abbe*, 2 N. B. R. 75.) A firm cannot be adjudged bankrupt on the petition of one of the partners against his copartners, where it appears that the firm had been dissolved by judicial decree and all its assets transferred to a receiver, and that there are firm debts. (*In re Hopkins*, 18 N. B. R. 339.) A firm not subsisting at the date of the filing of the petition cannot be adjudged bankrupt, if there are no firm assets, though there may be firm debts still unpaid. (*In re Crockett*, 2 N. B. R. 208; *S. C.*, 2 Ben. 515; *In re Hartough*, 3 N. B. R. 422.) Partnerships can be adjudged bankrupts only when they actually exist, or where there are assets, and not when terminated by bankruptcy, insolvency, assignment or otherwise. (*In re Winkens*, 2 N. B. R. 349; *In re Little*, 1 id. 341.) A discharge in bankruptcy extinguishes all the debts of the bankrupt provable under the act existing at the date of the filing of his petition in bankruptcy, and any judgment that may be obtained upon any of such debts, if such judgment be entered before the date of the discharge in bankruptcy. (*Sands v. Perry*, 38 Hun, 268; *Clark v. Rowling*, 3 N. Y. 216; *Monroe v. Upton*, 50 id. 593;

Opinion of the Court, per DANFORTH, J.

Arnold v. Oliver, 64 How. 452; *Revere Copper Co. v. Dimock*, 90 N. Y. 33.)

DANFORTH, J. It appears by the motion papers that in May, 1875, the petitioner was a member of the firm of Gerry, Tilton & Colwell, and, as such, indebted to the plaintiff upon a promissory note of that date, made by the firm for the sum of \$2,569.73. It was not paid, and on the 10th of January, 1883, the plaintiff recovered judgment in the Supreme Court of this State against him and the other members of the firm. It also appears that on the 3d of August, 1878, he, then being a resident of the State of Massachusetts, filed in the proper court a petition that he be adjudged a bankrupt; that he was so adjudged, and, thereafter, so conformed to the requirements of the statutes of the United States relating to bankruptcy; that on the 30th day of March, 1883, an order was made by the District Court of the United States, sitting in bankruptcy, for the district of Massachusetts, that he be "forever discharged from all debts and claims which," under those statutes, were provable against his estate and which existed on the 3d day of August, 1878, subject to certain exceptions, of which the debt in question was not one. In September, 1886, he applied to the proper court for an order discharging the above judgment of record as against him. The motion was opposed by the judgment creditor, but granted by the court. The plaintiff appeals. We find no ground on which the appeal can succeed. The Code of Civil Procedure (§ 1268), provides that, at any time after two years have elapsed since a bankrupt was discharged from his debts, pursuant to the act of congress relating to bankruptcy, he may, upon proof of his discharge, apply to the court in which a judgment was rendered against him, for an order directing the judgment to be canceled and discharged of record; and "if it appears that he has been discharged from the payment of that judgment, an order must be made accordingly." The appellant contends:

First. That "the debtor was guilty of laches in not obtaining a stay from the United States court of the proceedings in the

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action in the State court." If he could have done so, he was not bound to take that course, and his omission cannot deprive him of the benefit of the statute above quoted. We do not see that the doctrine of laches applies, but if it does it was for the Supreme Court to deal with it, and its decision cannot be reviewed. *Medbury v. Swan* (46 N. Y. 200), cited by the respondent, involved a favor depending on the discretion of the Supreme Court, and its decision being adverse to the bankrupt, was not the subject of review.

Second. That "a discharge in bankruptcy of a single member of a copartnership does not act as a discharge of a copartnership debt if there are assets of the firm unless the firm is declared bankrupt." It appears as a fact in the case that before the petition in bankruptcy was filed the firm had been dissolved, and a general assignment without preferences made by it of all its property to assignees who qualified and took charge of and distributed its property. Not only then had the firm ceased to exist as between the parties, but there were no partnership assets, nor any power on its part to acquire any. It is true that the assignment did not release the obligation of the contract, but that was effected by bankruptcy if the debt was one provable against the bankrupt. (Bankrupt Act of 1867, §§ 32, 34; U. S. Bankrupt Act, §§ 5115, 5119.) That it was so provable requires no argument, for it is not one of the excepted classes; and, save those, all debts and liabilities, claims and demands, present or future, certain or contingent, to which the bankrupt was subject, or which were due and payable from him at the date of the adjudication, might be proved against his estate. (Bankrupt Act, § 19; R. S. of U. S., § 5067.) Moreover, if there were partnership effects, the interest of the bankrupt member vested in his assignee (Bankrupt Act, § 14; U. S. R. S., §§ 5044, 5046), as an asset. (*In re Beal*, 2 Nat. Bank. Reg. 578.)

The precise point was also decided by BLATCHFORD, J., *In the Matter of Frear* (1 Nat. Bank. Reg. 660; S. C., 35 How. Pr. 249), who was a member of a then late copartnership, but

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who filed his individual petition for a discharge from all his debts, it was held that the debt in question although a partnership debt, was provable whether there were assets of the copartnership or not. This view of the law is also consistent with the declaration in section 33 of the Bankrupt Act (U. S. R. S., § 5118), that no discharge should release or affect any person liable for the same debt with the bankrupt, either as partner or otherwise. Nothing else can be inferred, than that, within the intent of the act, one partner might be entitled to be discharged for or in respect of partnership debts.

Third. That the moving party is not within the Code (§ 1268, *supra*), because "the judgment was not included in his schedules in bankruptcy." It appears, however, that the debt which constituted the cause of action was set forth, and the amount and date, etc., of the note upon which the judgment was recovered, and the name and address of the plaintiff herein, as a creditor by virtue of it. The cases already decided in this court (*Clark v. Rowling*, 3 N. Y. 216; *Monroe v. Upton*, 50 id. 593), if applicable, show that the judgment is, for the purpose of the Code (*supra*), regarded as the old debt in a new form, and that a discharge of the cause of action, as described in the bankruptcy proceedings, discharged the judgment which is founded upon and represents it. But the respondent says the provisions of the Code (*supra*), were not enacted until after the decision in those cases. That is true, yet the relief formulated by it had long before been effected by the uniform practice of the courts. (*Baker v. Judges of Ulster*, 4 Johns. 191; *Baker v. Taylor*, 1 Cow. 165; *Alcott v. Avery*, 1 Barb. Ch. 347.) The Code introduced no new law, but was in conformity with that practice and affirmatory of it. Its language is not open to doubt; but if it were, the act is remedial and should receive such construction as will advance its object. In any view which can be taken of it, we think the decision of the court below was right and its order, therefore, should be affirmed.

All concur.

Order affirmed.

Statement of case.

THE DIAMOND MATCH COMPANY, Respondent, v. WILLIAM
ROEBER Appellant.

Defendant, who was engaged in the manufacture in this State, and sale throughout the States and territories, of friction matches, sold his manufactory, stock, fixtures, trade, trade-mark and good will of the business, to a corporation then engaged in the same manufacture in the States of Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant, on the part of defendant, with the purchaser "and assigns" that he would not, at any time within ninety-nine years, engage in such manufacture or sale, except in the service of the purchasing company, within any of the States or territories, except Nevada and Montana; defendant also, at the same time executed to the purchaser a bond in the penalty of \$15,000, conditioned to pay that sum as liquidated damages in case of a breach of his covenant. In an action upon the covenant, *held*, that the restraint was partial, and not general, and that the covenant was valid; also, that the equitable jurisdiction of the court to enforce said covenant was not excluded by the fact that defendant, in connection with it, executed the bond.

It seems that, while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified. As to whether such a covenant is invalid, where the restraint is general, but, at the same time, is co-extensive only with the interest to be protected, and with the benefits intended to be conferred, *quære*.

The motive of the covenantee is not the test of the validity of such a covenant. A party may legally purchase the trade and business of another for the very purpose of preventing competition, and its validity, if supported by a consideration, depends upon its reasonableness as between the parties.

The question as to what is a general restraint of trade does not depend upon State lines; they are not the boundaries of trade and commerce, and a restraint is not necessarily general which embraces an entire State.

Also *held*, that defendant was not in a position entitling him to raise the question that the contract was, on the part of the corporation, *ultra vires*; that having received the benefits thereof, he must abide by its terms.

Also *held*, the plaintiff, as successor and assignee of the purchasing corporation was entitled to maintain the action; and the fact that it is a foreign corporation was no objection.

106	478
110	584
106	473
187	426
106	473
129	334
106	473
126	340
106	473
143	430
143	403

Statement of case.

The history of litigation upon the subject of contracts in restraint of trade showing the tendency of recent judicial opinion toward the relaxation of the old common law rule given, and the authorities, collated.

(Argued June 8, 1887 ; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, made March 20, 1885, which modified as to an additional allowance of costs and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.

Robert Sewell for appellant. Contracts in restraint of trade cannot be enforced at law or in equity. (2 Par. on Cont. 748 ; 752 ; *Mitchell v. Reynolds*, 1 P. Williams, 181 ; *Homer v. Ashford*, 3 Bing. 320 ; *Horner v. Graves*, 7 id. 735 ; *Noble v. Bates*, 7 Cow. 307 ; *Maier v. Homan*, 4 Daly, 168 ; *Bingham v. Maigne*, 52 Super. Ct. 90 ; *Sar. Co. Bk. v. King*, 44 N. Y. 90 ; *Curtis v. Gokey*, 68 id. 300 ; *Lawrence v. Kidder*, 10 Barb. 641, 647 ; *Chappel v. Brockway*, 21 Wend. 157 ; *Ross v. Sadgbeer*, id. 166 ; *Holbrook v. Waters*, 9 How. 335 ; *Dunlop v. Gregory*, 10 N. Y. 241 ; *Oregon Steamboat Case*, 20 Wall. 64 ; *Arnott v. Pittston C. Co.*, 68 N. Y. 506 ; *Ebling v. Bauer*, 17 Week. Dig. 497 ; *Mackinnon Pen Co. v. Fountain Ink Co.*, 422, 423.) Neither can the contract in question be sustained under the authorities as one in partial restraint of trade. (*Stearns v. Barrett*, 1 Pick. 450 ; *Pierce v. Fuller*, 8 Mass. 226 ; *Perkins v. Lynn*, 9 id. 530 ; *Morse Drill Co. v. Morse*, 103 id. 73 ; 30 Ga. 414 ; 45 id. 319 ; 8 id. 567 ; *Holmes v. Martin*, 10 id. 503 ; *Wright v. Rider*, 36 Cal. 357 ; *Oregon S. Nav. Co. v. Windsor*, 20 Wall. 67 ; *Taylor v. Blatchford*, 13 Allen, 375 ; *Dunlop v. Gregory*, 10 N. Y. 241 ; *Moore v. Bennett*, 40 Cal. 251 ; *W. Va. Trans. Co. v. O. R. P. L.*, W. Va. 600, 617 ; *Law-*

Statement of case.

rence v. Kidder, 10 Barb. 641; Horner v. Graves, 7 Bing. 735; Bingham v. Maigne, 52 Super. Ct. 90; Mandeville v. Harman, 23 Rep. 372; Keeler v. Taylor, 53 Penn. St. 469; Kimberly v. Jennings, 6 Sim. 352; Hitchcock v. Coker, 5 Ad. & El. 454; Brewer v. Marshall, 4 C. E. Gr. 537, 546; Leather Cloth Co. v. Lorsest, L. R. 9 Eq. 345; Jarvis v. Peck, 10 Paige, 118; Ward v. Byrne, 5 M. & W. 548; Hinde v. Gray, 1 M. & G. 195; Allsopp v. Wheatcroft, L. R. 15 Eq. 79; Collins v. Locke, 4 App. Cas. 464; 1 Smith's L. Cas. [8th ed.] 432; Arnott v. P. & E. Coal Co., 68 N. Y. 558.) Plaintiff has failed in making out a case for the interposition of a court of equity. (Waterman on Spec. Per. Conts. 727; 2 Story Eq. Jur. § 1318; Bagley v. Peddie, 16 N. Y. 469; Kemp v. Knick. Ice Co., 69 id. 58; Little v. Banks, 85 id. 258; Marshall v. Peters, 12 How. Pr. 218; Balcom v. Juliën, 22 id. 349; Denning v. Chapman, 11 id. 382; Ward v. Kelsey, 14 Abb. Pr. 106; Sixth Ave. R. R. Co. v. Kerr, 28 How. 382; Lathrop v. Lathrop, 47 id. 532; Griffin v. Winne, 10 Hun, 571; McHugh v. R. R. Co., 66 Barb. 612; Nessel v. Reese, 19 Abb. Pr. 240; Barnes v. McAllister, 18 How. 534.) The courts will not, by injunction, restrain a party from the violation of a contract in which the parties have fixed and liquidated the damages for such violation. (Willard's Eq. Jur. 274, 278; Hoffman's Prov. Rem. 215; Howell v. L. I. R. R. Co., 22 Week. Dig. 487; Dunlop v. Gregory, 10 N. Y. 241; Nobles v. Bates, 7 Cow. 307; Vincent v. King, 13 How. Pr. 234; Barnes v. McAlister, 18 id. 534; Bagley v. Peddee, 16 N. Y. 469; Dakin v. Williams, 17 Wend. 447; Knapp v. Malby, 13 id. 587; Price v. Green, 16 M. & W. 346; Galsworthy v. Strutt, 1 W. H. & Y. [Exch. R.] 659; Wooster v. Kirch, 26 Hun, 61; Kemp v. Knick. Ice Co., 69 N. Y. 58; Ft. Clark R. R. Co. v. Anderson, 108 Ill. 64; S. C., 29 Alb. Law Jour. 104; Little v. Banks, 85 N. Y. 258, 266.) Independently of the question as to whether or not it is against public policy to have this contract stand at all, the convenience of the people of this State is to be taken into consideration. (Wedgwood v. Adams,

Statement of case.

6 Beav. 600; *Cullen v. H. W. P. Co.*, 116 Mass. 90; *Arnott v. P. & E. C. Co.*, 68 N. Y. 566; *Stone v. Pratt*, 25 Ill. 75; *Pomeroy's Eq. Jur.* §§ 934, 1405; *Shrewsbury & B. R. R. Co. v. L. & N. W. R. R. Co.*, De G. M. & G. 115; *S. C.*, 6 H. & L. 113; *Godwin v. Collins*, 4 H. & D. 28.) Equity will refuse to decree the specific performance of this contract, because it is *ultra vires*. (*Christian Un. v. Fount*, 101 U. S. 356; *State v. B. R. R. Co.*, 25 Vt. 488; *Morawetz on Corp.* §§ 502-507, 509 *et seq.*; *Bard v. Poole*, 12 N. Y. 495; *White v. Howard*, 46 id. 114.) A contract injuriously affecting the revenue of the country cannot be enforced. (*Smith v. Merritt*, 14 N. Y. 452; *Meux v. Humphreys*, 3 C. & P. 79.) The covenant now sought to be enforced was purely a personal one between the defendant and the plaintiff's assignor, and could not be transferred. (*E. H. & N. R. R. Co. v. Comm.*, 9 Bush. [Ky.] 438.)

Noah Davis for respondent. The defendant's objection that the plaintiff is confined to an action at law for the liquidated damages mentioned in the bond is not well taken, he is entitled to the enforcement of defendant's covenants by a court of equity. (*Phoenix Ins. Co. v. Cont. Ins. Co.*, 87 N. Y. 400, 404; *Long v. Bowring*, 33 Beav. 585; *Howard v. Woodward*, 10 Jur. [N. S.] 1123; *Coles v. Sims*, 5 De G. McN. & G. 1, 11; *Bird v. Lake*, 1 Hun & Miller Ch. 111; *Dooley v. Watson*, 1 Gray [Mass.] 414; *Graham v. Bickham*, 4 Dallas, 150; *Clark v. Jones*, 1 Denio, 516; *Fisher v. Barrett*, 4 Cush. 381; *Plunkett v. Meth. Ch.*, 3 id. 561; *Logan v. Weinhold*, 1 C. L. & F. 611; *Gillis v. Hall*, 2 Brewster, 342; *Jones v. Heavens*, L. R. 4 Ch. Div. 636.) The covenant is not void as being in restraint of trade. (*Curtis v. Gokey*, 68 N. Y. 300; *Oregon St. Nav. Co. v. Winsor*, 20 Wall. 64.) The covenant was reasonable. (*Chappell v. Brockway*, 21 Wend. 162; *Horner v. Graves*, 7 Bing. 743; *Dunlap v. Gregory*, 6 Seld. 241; *Jarvis v. Peck*, 10 Paige, 118; *Gillis v. Hall*, 2 Brews. 342; *Morgan v. Perhamus*, 36 O. St. 517; *Hedge v. Lowe*, 47 Ia. 137; *Peltz v. Echele*, 62 Mo. 171;

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Hearn v. Griffin, 2 Ohit. R. 407; *Leighton v. Wales*, 3 M. & W. 345; *Morris v. Coleman*, 18 Vesey, 437; *Brown v. Guy*, 4 East 190; *Leather C. Co. v. Lorsest*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 L. R. Ch. Div. 351; 2 High on Inj. chap. 19, § 1174; *Heller v. Hersee*, 10 Hun, 433.) The contract in this case is not in restraint of trade within the meaning and policy of the rule invoked by the appellant. (*Wallis v. Day*, 2 M. & W. 273; *Morse T. D. & M. Co. v. Morse*, 103 Mass. 73.) The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as the assignee of all its business and property and of the defendant's obligation, is entitled to the same rights and privileges, and the same remedies under that obligation as were possessed by its predecessor and assignor. (*Hedge v. Lowe*, 47 Ia. 137; *McHenry v. Jewett*, 90 N. Y. 58; *Williams v. W. Un. Co.*, 93 id. 640.) Defendant not having returned or offered to return the consideration paid to him, he cannot, therefore, insist that he is not bound by the obligation for which that consideration was given. (*Gould v. Cayuga Co. Bk.*, 86 N. Y. 75; *Howard v. Hayes*, 47 Super. Ct. 89; *Farrell v. Corbett*, 4 Hun, 128; *Whitney A. Co. v. Barlow*, 68 N. Y. 62; *Parish v. Wheeler* 22 id. 508; *Pratt v. Eaton*, 18 Hun, 293.) The assumption that the plaintiff, as a foreign corporation, cannot maintain this action, is without foundation. (Code of Civil Pro. § 1779; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Bk. of Augusta v. Earle*, 13 Peters 519; *Hibernia Bk. v. Lacombe*, 84 N. Y. 367; *Bk. of Mich. v. Williams*, 5 Wend. 478; *Silver L. Bk. v. North*, 4 Johns. Ch. 370; *P. & B. P. Works v. Willetts*, 14 Abb. 119; *Western Res. Bk. v. Potter*, 1 Clark Ch. 432.)

ANDREWS, J. Two questions are presented: First. Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employe of

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said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the territory of Montana," is void as being a covenant in restraint of trade; and, Second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant. There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 west Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks and good will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase-price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase-price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on

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the business of manufacturing friction matches in the States of Connecticut, Delaware and Illinois, and of selling the same "in the several States and territories of the United States and in the District of Columbia;" and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen and that his matches were found in the hands of dealers in ten States. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney and Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice PARKER (Lord Macclesfield) in

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the leading case of *Mitchel v. Reynolds* (1 P. Williams, 181), and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality were considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (Vol. 2, p. 748, note). The earliest reported case, decided in the time of Henry V, was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and, before the case of *Mitchel v. Reynolds*, it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to *Mitchel v. Reynolds*, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the court was sustained (*Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157;

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Dunlop v. Gregory, 10 N. Y. 241). In *Alger v. Thatcher* (19 Pick. 51), the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchel v. Reynolds* the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says, "for the former of these must be void, being of no benefit to either party and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz.: The mischief which may arise (1) to the party, by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2), to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade

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are void irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (*Rousillon v. Rousillon*, 14 L. R., Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves* (7 Bing. 735), Chief Justice TINDAL considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir GEORGE JESSELL, in *Printing Company v. Sampson* (19 Eq. Cas. L. R. 462) "there is one thing more than any other which public policy requires, it is that men of full age and com-

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petent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice." It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. (But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege.) If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. (*Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Rousillon*

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v. *Rousillon*, *supra*; *Leather Co. v. Lorsche*, 9 Eq. Cas., L. R., 345; *Collins v. Locke*, 4 App. Cas., L. R., 674; *Oregon Steam. Co. v. Winsor*, 20 Wall. 64; *Morse v. Morse*, 103 Mass. 73.) In *Whitaker v. Howe*, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In *Rousillon v. Rousillon*, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In *Jones v. Lees*, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. BRAMWELL, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In *Oregon Steam. Co. v. Winsor* the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. (*Ward v. Byrne*, 5 M. & W. 548; *Mumford v. Gething*, 7 C. B. [N. S.] 305, 317.) It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York, constitutes a general restraint within the authorities. In *Chappel v. Brockway* (*supra*), BRONSON, J., in stating the

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general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Oregon Steam. Co. v. Wisnor* (*supra*) supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the trans-

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action became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction, was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance (*Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400, 405.) But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated, does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in *Long v. Bowring* (33 Beav. 585), which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1,000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. (*Phoenix Ins. Co. v. Continental Ins. Co.*,

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supra; *Long v. Bowring, supra*; *Howard v. Woodward*, 10 Jur. N. S. 1123; *Coles v. Sims*, 5 De G., McN. & G. 1; *Avery v. Langford*, Kay's Ch., 663; *Whittaker v. Howe, supra*; *Hubbard v. Miller*, 27 Mich. 15.)

There are some subordinate questions which will be briefly noticed.

First. The plaintiff, as successor of The Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. (*Hedge v. Lowe*, 47 Iowa 137, and cases cited.) *Second.* The defendant is not in a position which entitles him to raise the question that the contract with The Swift & Courtney & Beecher Company was *ultra vires* the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. (*Whitney Arms Co. v. Barlow*, 68 N. Y. 34.) *Third.* The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation and a violation of the rules of comity to grant or withhold relief in our courts upon such a discrimination. (*Merrick v. Van Santvoord*, 34 N. Y. 208; *Hibernia Nat. Bank v. Lacombe*, 84 id. 367; Code Civ. Pro. § 1779.) *Fourth.* The consent of The Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann, did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except PECKHAM, J., dissenting.

Judgment affirmed.

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THE FIRST NATIONAL BANK OF BALLSTON SPA, Appellant,
v. THE BOARD OF SUPERVISORS OF SARATOGA COUNTY,
Respondent.

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No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other; and no obligation can be implied in law from a voluntary payment of the debt of another, without his request, by one who is under no legal liability or compulsion to make it.

The proportion of the State tax levied upon a county and charged to its treasurer is payable by him; not as the officer or agent of the county but as an individual, designated by his official name for the performance of specific duties, and the county is not responsible for his omissions or defaults in respect thereto save in the manner prescribed by law.

In case of the failure or neglect of the county treasurer to pay over the taxes due the State, or to render an account thereof to the comptroller, it is not until the remedy against him and against his bail has been exhausted and the loss by reason of that default has been thus ascertained, that the county is required to act or any duty is attached to it. (Chap. 427, Laws of 1853, Chap. 393, Laws of 1863.)

M., a county treasurer, being in default in the payment of the State tax levied upon his county, executed two notes in his name of office purporting to be by authority of the board of supervisors, but without any actual authority from that body. These notes were discounted by plaintiff, the proceeds credited in the individual account of M. and paid out on his checks to the State treasurer to apply on his account with that officer. *Held*, that an action was not maintainable against the board of supervisors to recover the amount as for so much money had and received by the county for its benefit and use; that the indebtedness to the State discharged by the money procured from plaintiff, was not that of the county but of M.; but that conceding it to have been a county indebtedness, plaintiff, having voluntarily furnished M. with the means to discharge the debt without any request or promise to pay on the part of the county, did not thereby become its creditor, and no liability on its part was created.

Newman v. Supervisors (45 N. Y. 676, 687); *Bridges v. Supervisors* (93 id. 570), distinguished.

(Argued June 9, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 12, 1885, which affirmed a judgment

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in favor of defendant entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

L. B. Pike for appellant. The debt paid by the treasurer, was the debt of the county of Saratoga. *Merch. Bk. v. Sup'rs*, 5 T. & C. 396, 397; 62 N. Y. 629; *Mayor, etc. v. Davenport*, 92 id. 604, 615; *Sup'rs v. Otis*, 62 id. 97; R. S. pt. 1, chap. 13; R. S. [Banks 6th ed.] 985, § 5; 45 N. Y. 686.) The receipt of the money by the treasurer, and payment of it upon the indebtedness of the county, created a liability of the county to pay the debt thus incurred for its benefit. (*Bridges v. Sup'rs*, 92 N. Y. 570; *Hill v. Sup'rs*, 12 id. 52; *Dewey v. Sup'rs*, 62 id. 294; *Bk. of Comm. v. Mayor, etc.*, 43 id. 184; *Chapman v. Brooklyn*, 40 id. 372; *Ely v. Norton*, 3 Keyes, 397; *Hathaway v. Cincinnati*, 62 N. Y. 447; *Gray v. Sup'rs*, 93 id. 608; *Baker v. Sup'rs*, 3 Week. Dig. 293; *Long v. Russell*, 45 N. Y. Super. Ct. 434; *Bell v. Boughton*, 2 Denio, 91; *Nelson v. Mayor, etc.*, 63 N. Y. 544; 2 Keyes, 202.) The money having been procured from the bank upon unauthorized notes and by the financial officer of the county without authority, and a fraud thereby practiced upon the plaintiff by which it parted with its funds, which were appropriated by the county to its immediate benefit, the county cannot repudiate the fraud and keep the funds. If it keeps the funds it must, upon its implied contract, pay the plaintiff. (*Nat. L. Ins. Co. v. Minch*, 53 N. Y. 144; *Cobb v. Dows*, 10 id. 345; *Graves v. Speir*, 58 Barb. 349; *Beverly v. Haight*, 92 N. Y. 51.) Negligence on part of plaintiff, so long as it works no injury to defendant, avails nothing. (43 N. Y. 452; 40 id. 391; *Caussidiere v. Biers*, 2 Keyes, 202; *Wetmore v. Porter*, 92 N. Y. 81.) Receiving the consideration of or otherwise deriving benefit from an unauthorized contract entered into on behalf of a principal by an agent, after full knowledge of the facts, operates as a ratification of the whole

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contract by the principal, and makes the latter liable as fully to all intents and purposes as if direct authority had been originally given. (Story on Agency, § 239 *et seq.*; 2 Potter on Corp. 601, n. 23; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Nelson v. Mayor, etc.*, 63 id. 536; *Brady v. Mayor, etc.*, 20 id. 312; 5 Abb. [N. C.] 49, *note.*) The silence of the county until after suit; its conduct in receiving, appropriating and keeping the plaintiff's money, and in resisting its collection, constitute a ratification supplying the want of the delegation to Mann by the county, of the power the county clearly had to make the contract. (*Argenti v. San Francisco*, 16 Cal. 255; 63 N. Y. 544; *Dillon on Mun. Corp.* §§ 384, 750; *Potter on Corp.* § 508.)

Charles S. Lester for respondent. The loan in suit being made without the shadow of authority, and in direct violation of a statutory prohibition, no recovery can be had. (*Donovan v. Mayor, etc.*, 33 N. Y. 291; *McDonald v. Mayor, etc.*, 68 id. 23; *Smith v. Newburgh*, 77 id. 130; *Parr v. Vil. of Greenbush*, 72 id. 463; *Wellington v. Lawrence*, 73 Me. 125.) By neglecting his duty to pay over, and embezzling the funds, the county treasurer became personally liable, and the money borrowed of the bank thus paid his personal liability. (Laws of 1855, chap. 427, § 13; 3 Edmunds, 359; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; *Gray v. Sup'rs*, 26 Hun, 265; *Hart v. Bulkley*, 2 Edw. Ch. 70; *People v. City Bk. of Roch.*, 93 N. Y. 582; *People v. Merch. & M. Bk.*, 78 id. 269; *Com. Bk. v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Co. Bk.*, 34 Barb. 298.) The loan made by the plaintiff to Henry A. Mann was a voluntary loan to a person who had no authority to borrow it for the defendant. Money advanced by a person under no restraint, compulsion or duress, cannot be recovered back. (*Com. Bk. of Rochester v. Rochester*, 42 Barb. 488; 2 Hun, 394.) The plaintiff could not make himself a creditor of defendant by voluntarily discharging a duty which belonged to defendant, even in case a duty did rest on defendant. (*Gould v. Phœnix*, 3 T. & C. 797;

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Ingraham v. Gilbert, 20 Barb. 151; *Salsbury v. Phila.*, 44 Penn. St. 303; *Baltimore v. Poultney*, 25 Md. 18; *Jeffersonville v. Ferryboat*, 35 Ind. 19; *Inhabs. of S. Scituate v. Hanover*, 9 Gray, 420; *Bicknell v. Bicknell*, 111 Mass. 265.)

DANFORTH, J. On the 1st of February, 1875, the State treasurer charged the "treasurer of the county of Saratoga" \$76,960.51, being the State tax of 1874, as levied upon that county, and also with items of taxes canceled in that year amounting to \$498.54. On the 17th of May, 1875, there was credited on this account the sum of \$10,000, which, with other payments not in question here, so reduced the account that on the third of June the balance due from the treasurer to the State was \$32,624.18. Henry A. Mann, was then and since February 1, 1873, had been treasurer of the county, and on the fourth of June, an action was brought by the attorney-general in the name of the People against him to recover this sum, as so much money belonging to the State which he had received and neglected to pay over. On the seventeenth of June he paid, and the account was credited with \$20,000, and subsequently judgment went against him in that action by default for \$10,274.27, being the balance of the account first mentioned. The plaintiff now sues the county of Saratoga to recover the sum of \$10,000, which it alleges was advanced by it to Mann, as treasurer, to enable him to make the payment of May seventeenth, and the further sum of \$10,000, which it alleges was in like manner advanced for a similar purpose, and in fact entered into and made part of the payment of \$20,000, credited June seventeenth. Upon both occasions the plaintiff discounted Mann's note, the first being in these words:

"No. —

"SARATOGA COUNTY TREASURER'S OFFICE,)
"BALLSTON SPA, June 16, 1875.)

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga county treasurer's

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office, on or before the 15th day of February, 1876, to First National Bank, Ballston Spa, or bearer, ten thousand dollars, at seven per cent interest, for value received.

“\$10,000.

“(Signed.)

HENRY A. MANN,

“*Treasurer.*”

The other is in similar terms except the date, and in each instance the proceeds were placed to his individual credit upon the books of the bank. The complaint prayed that these notes be declared valid claims against the county of Saratoga, and that the plaintiff have judgment thereon for the sum of \$20,000, or in case it be adjudged that they are not valid then that the plaintiff have judgment against the county as for so much money had and received by said county for its benefit and use as above set forth.

The first alternative is not urged upon this appeal, nor is it now claimed that Mann was in any manner authorized to borrow the money for the county, nor that his contract for its repayment is binding or can be made binding upon it. It was so claimed, but the finding of the trial judge was to the contrary, and although that finding was excepted to, the exception is not presented here. Indeed, the argument of the learned counsel for the plaintiff against the judgment which defeats its claim, implies that Mann, in procuring the money, was not acting under the authority of the defendant, but is to the effect that the money obtained was appropriated by him to the payment of a debt due from the county to the State, and so, as he argues, the county thereby became bound to pay the plaintiff. If this be admitted as the law, it is obvious that boards of supervisors, who are empowered by statute “to examine, settle and allow all accounts chargeable against” their respective counties, “and to direct the raising of such sums as may be necessary to defray the same” (1 R. S., 367, § 4, sub. 2), may be greatly relieved of their functions by the action of any person who will take the risk of proving, to the satisfaction of a court or jury, that the debt

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he voluntarily pays, or enables another to pay, was the proper debt of the county as a body corporate. But this conclusion can only be reached by overriding the statute, which not only limits the powers of a county as a contracting party (1 R. S., 364, § 1, sub. 3), but declares that those powers can be exercised only by the board of supervisors, or in pursuance of a resolution by them adopted. A doctrine which will permit that to be done by implication which cannot be done expressly, and which is fraught with so many obvious evils, is to prevail only upon persuasive and controlling authorities. In number the cases cited by the appellant are enough, and they came from this court, but do they reach the necessary mark? The one emphasized by the appellant is *Newman v. Supervisors of Livingston Co.* (45 N. Y. 676, 687), where it appeared that through the corporate act of that county an illegal tax had been enforced and paid by the collector into the county treasury, it was held that an action as for money had and received would lie in favor of the taxpayer against the county. In *Bridges, Supervisor of the Town of Liberty v. Supervisors of Sullivan Co.* (92 N. Y. 570), taxes collected of a railroad company and appropriated by law to the payment of town bonds issued in its aid, were improperly paid by the collector to the county treasurer, when they should have been paid to the railroad commissioner, it was held that a similar action would lie. These cases and all others cited on this point are easily distinguishable from the one before us. Here the plaintiff, in the most favorable view which can be taken of its case—and so it is presented by the appellant's counsel—seeks to make itself a creditor of the defendant by voluntarily enabling Mann to discharge a debt due from the defendant. The defendant made no request for the money, no promise to repay, and the record contains no finding or evidence from which either can be implied.

Indeed the proposition submitted by the appellant, and its only claim, is put in these words: "The receipt of the money by the treasurer, and payment of it upon the indebtedness of the county, created a liability of the county to pay

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natural justice, to which the plaintiff refers as arising "*ex æquo et bono*," which imposes any obligation in its favor upon the defendant. It holds no contract obligation; it has acquired no right, and consequently no equitable debt. We think the action was not well brought, and that the complaint was properly dismissed.

The judgment should be affirmed.

All concur except PECKHAM, J., not sitting.

Judgment affirmed.

THE CITY OF BROOKLYN, Respondent, v. GEORGE COPELAND,
Appellant.

Under the act of 1861 (Chap. 340, Laws of 1861), providing for a public park for the city of Brooklyn, the city acquired a fee in the lands taken, impressed with a trust, of which the legislature could relieve the city. Plaintiff's complaint herein alleged, in substance, that, under the provisions of said act it became and still is the owner in fee and possessed of certain land described in the complaint; that under a statute authorizing it (Chap. 373, Laws of 1870, as amended by Chap. 795, Laws of 1873), a sale of said land was made to defendant and he entered into a contract to purchase, but that he has refused to take title or pay the purchase-money. Plaintiff asked for a specific performance. The answer admitted each and every allegation of the complaint, except it denied that the statutes mentioned were competent to vest in plaintiff the ownership of the land in question. *Held*, that the allegation of ownership in the complaint was equivalent to an averment of compliance with the terms of the act of 1861, *i. e.*, that the commissicner's report was confirmed and payment made to the owners of the land or their assent obtained by deed duly executed; that this averment was not denied by the answer, which simply put in issue the quantum of the estate acquired by the city; and as, if true, such averment would preclude the owners from thereafter questioning the validity of the act, its constitutionality could not be questioned here.

On the trial plaintiff's counsel asked the counsel for defendant if it was admitted that the steps required by the act for the taking of lands had been taken; the latter replied that it was, except that no admission was made that awards for the lands were accepted by the owners under such circumstances as to operate as a voluntary grant, or to estop

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defendant from denying the sufficiency of the acts to vest title. *Held*, that this did not detract from the admission in the answer.

By the terms of sale the park commissioners contracted to give a full covenant and warranty deed, except as to liens and debts imposed by legislative action; these the city assumed and agreed to discharge. *Held*, that the contract was valid.

In this respect the case of *Brooklyn Park Commissioners v. Armstrong* (45 N. Y. 284), distinguished.

(Argued June 10, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 13, 1885, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This was an action to compel a specific performance of a contract for the purchase of certain lands.

The substance of the pleadings and the material facts are set forth in the opinion.

H. C. M. Ingraham for appellant. The city did not acquire an alienable fee. (Laws of 1861, chap. 340; Laws of 1865, chap. 603; *Brooklyn P. Com'rs v. Armstrong*, 45 N. Y. 284; *Wash. Cem'ty v. P. P. & C. I. R. R. Co.*, 68 id. 595.) It is only where the title is acquired in fee simple absolute that the property may be sold. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 172.) The act of 1861, as it authorized the taking of private property against the owner's consent, is to be strictly construed, and while the property and the estate which is to be taken, whether an easement or fee, and the purposes to which it is to be applied, may be designated in the statute, it must be by unequivocal words, and, in pursuing it, all prescribed requirements must be strictly observed. (*In re Water Com'rs Amsterdam*, 96 N. Y. 357; *Sixth Ave. R. R. Co. v. Kerry*, 72 id. 330; *Wash. Cem'ty v. Prosp. Park R. R. Co.*, 68 id. 591; *Sweet v. B., N. Y. & Phila. R. R. Co.*, 79 id. 300.) The act of 1865, being local, was unconstitutional and void as to such portions thereof as provides for

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the taking of the fee to the lands condemned under the act of 1861. (*People v. Hills*, 35 N. Y. 451; *People v. O'Brien*, 38 id. 193; *Kerrigan v. Force*, 68 id. 381; Constitution of N. Y. art. 3, § 16; *Huber v. People*, 49 N. Y. 132; *Gaskin v. Meek*, 42 id. 182; *In re Blodgett*, 89 id. 392; *In re Paul*, 94 id. 497; *In re Flatbush Lands*, 60 id. 407; *In re Sackett St.*, 74 id. 95.) As neither of said acts, under which the plaintiff claims to have acquired title, provides for any notice to the owner of the lands taken as to what amount of damages should be allowed to such owner, said acts are unconstitutional and void as to the provisions for taking of the lands by eminent domain. (*Stewart v. Palmer*, 74 N. Y. 183; *People v. Eq. Trust Co.*, 96 id. 395; *In re Jacobs*, 98 id. 111; *Owners of Ground v. Mayor, etc.*, 15 Wend. 375.) Those from whom the lands were originally taken, and their heirs and assigns, have a right to question the validity of the plaintiff's title, or the title of the purchaser from the plaintiff. (*Seaman v. Vawdrey*, 16 Ves. 390; *Fleming v. Burnham*, 100 N. Y. 1; *Rice v. Barrett*, 102 id. 161; *Shriver v. Shriver*, 86 id. 575.)

Almet F. Jenks for respondent. The acts of the legislature, under which these lands were acquired and subsequently sold, vested in plaintiff an absolute alienable title in the lands purchased by defendant. (Laws of 1861, chap. 340; *In re Mayor, etc., of N. Y.*, 99 N. Y. 569; 576, 577; Laws of 1865, chap. 603; *Brooklyn P. Com'rs v. Armstrong*, 45 N. Y. 234.) The city was not estopped from selling the land under the direct sanction of the legislature, for the reason that the value of the neighboring property had been enhanced in anticipation of a park. (*Heywood v. Mayor, etc.*, 7 N. Y. 314; *Sweet v. B., N. Y. & Phila. R. R. Co.*, 79 id. 293; *Story v. N. Y. El. R. R. Co.*, 90 id. 122, 172; *In re Un. F. Co.*, 98 id. 139, 153.) The Constitution has neither in terms nor by fair implication required that the commissioners in such a case shall take evidence concerning the value of the property intended to be appropriated. (34 Hun, 447; *In re Emp. Bk.*, 18 N. Y. 199; *Tracy v. Corse*, 58 id. 143;

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Rockwell v. Nearing, 35 id. 314; *Happy v. Mosher*, 48 id. 317; *Campbell v. Evans*, 54 Barb. 588; *In re Middleton*, 82 N. Y. 201.)

PECKHAM, J. The lands in this action in controversy became the property of the city of Brooklyn under the act of the legislature passed May 2, 1861, being chapter 340 of the Laws of that year.

Upon a sale by the city of these lands, the defendant purchased them and has since refused to complete his purchase, on the ground that the plaintiff cannot convey a good title in fee. The defendant claims that the act of 1861 did not vest an alienable fee in the plaintiff in lands duly acquired under its provisions, but only a right to the perpetual use of such lands for park purposes. He also claims to raise some constitutional questions regarding the act of 1861, and also the act of 1863 amending that act. We do not think he is in a position to raise any question of a constitutional character.

It is unquestioned that the lands comprised in this controversy were acquired under the provisions of the act of 1861. In the complaint herein it is alleged that the plaintiff, under the provisions of that act, became and still is the owner in fee and possessed of certain real property (which is the property in question), and that by an act of the legislature authorizing it (Chap. 373, Laws of 1870, as amended by Chap. 795, Laws of 1873), a sale of such lands was made to the defendant, and that he entered into a contract to purchase but that he has refused to take title or pay the purchase-money. The answer of the defendant admitted each and every allegation of the complaint, except that it denied that the legislative acts therein mentioned were competent to vest in said city the ownership in fee of the lands therein described. This is not a denial of that part of the complaint which alleges that plaintiff, under the provisions of the act of 1861, became and still is the owner in fee and possessed of certain real property. The eighth section of the act of 1861, provides that after the confirmation of the report of the commissioners of appraisal,

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and upon payment being made to the owners of the lands in such report mentioned, or upon their assent thereto, by deed duly executed, the said lands shall vest forever in the city of Brooklyn for the uses and purposes in this act mentioned. As the complaint alleged an ownership in fee under the provisions of the act, it was equivalent to an allegation of a compliance with the terms of the act under which the fee was claimed, and hence was the same as an allegation that the commissioner's report was confirmed and that payment was made to the owners of the lands, or their assent obtained by deed duly executed, and that thereby the lands became vested forever in the city for the uses and purposes mentioned in the act. A denial, therefore, that the acts mentioned were competent to vest in the city a fee in the lands mentioned, clearly does not deny that under the act a payment was made to the owners or their assent obtained by deed duly executed, which, if true, would preclude such owners from thereafter questioning the validity of the act. But the denial under consideration would raise the question as to the quantum of the estate which was thus obtained by the city. By the affirmative admission of each and every allegation of the complaint, which the answer makes, with the exception just spoken of, the only issue raised was one as to the amount of the estate obtained by the city, and the constitutional questions affecting the validity of the act could not be raised by an owner who was paid the price for the land, and who executed a deed thereof and delivered possession to the city. By accepting such payment or executing such deed, he, in the language of Judge FOLGER in the *Brooklyn Park Commissioners v. Armstrong* (45 N. Y. 234), renounced any constitutional provision made for his benefit, and gave an assent to the taking of the land, even if there were any question as to the validity of the act or any irregularity in the proceedings under it, and the fair meaning of the allegation in the complaint stating ownership in fee, is that payment was made and accepted, or a deed duly executed.

The force of this admission in the answer is not broken by

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what took place on the trial. The plaintiff's counsel asked the counsel for defendant if it was admitted that the steps required to be taken by the act for the taking of lands for park purposes had been taken. The defendant's counsel said it was, except no admission was made that any awards for the lands were accepted or received by the owners *under such circumstances* as to operate as a voluntary grant or to estop the defendants from denying the sufficiency of the acts to vest title in fee in the plaintiff. This statement does not detract from the admission already of record in the answer. It admits by a very strong implication that awards were accepted or received by the owners, but left it to proof on their part that they were not so received or accepted as to estop them, etc. The defendant gave no proof on the subject. Taking it altogether, we are quite clear there is enough in the record to show the assent of the owners to the taking of the lands and an acceptance by them of the price thereof.

The next question arises upon the character of the estate obtained by the city, for this issue is made by the pleadings. We do not think, however, that it is one which is open to discussion in this court. In the case of *Brooklyn Park Commissioners v. Armstrong* (*supra*), it received a thorough examination at the hands of FOLGER, J., and that learned judge came to the conclusion that under the act of 1861 the city took a fee, and this opinion was concurred in by the whole court. We do not assent to the proposition that this portion of the opinion was *obiter*. On the contrary, the question, among other things, was fairly up as to what title the city took under this act of 1861. The case was brought as a test one to try the title, and the court held that the city acquired the fee, impressed with a trust to hold, for park purposes, which the legislature could relieve the city from, but that bonds having been issued secured by all the land, no portion could be sold free from this pledge; and as the park commissioners had assumed to convey free from all incumbrances, they could not fulfill, and hence the title was not

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and we have no disposition to review or to doubt the correctness of the decision reached therein. By the terms of sale of the lands in question in this action the park commissioners avoided the only difficulty which existed in regard to the sale of the lands mentioned in the *Armstrong Case*. They advertised to sell the land and to give a full covenant and warranty deed, except as to liens and debts imposed by legislative action which the city assumed and agreed to discharge. Every question which has been argued here, other than the constitutional ones, has been decided by the above cited case of *Armstrong*; and, for the reasons already given, the constitutional questions cannot be raised.

The judgment of the Supreme Court should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ALEXANDER DUMAR, Appellant.

Under the provision of the Code of Criminal Procedure, prescribing the form of an indictment (§ 275), it must charge both the crime and the act constituting it; the omission of either is fatal.

Where either one of several acts constitutes a crime it may be charged in the same indictment as "having been committed by different means" (§ 278), but the several acts must be separately stated in different counts, and where the indictment has but one count, charging one of the acts constituting the crime, it cannot be sustained by proof that the crime was committed by different means.

Where, therefore, an indictment for grand larceny charged the act constituting the crime thus, that defendant "unlawfully and feloniously did steal, take and carry away" the property described. *Held*, that the indictment could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations.

The distinction between the crime of larceny at common law or under the Revised Statutes and as defined by the Penal Code (§ 528), pointed out. *People v. Willott* (102 N. Y. 251), distinguished.

(Argued June 13, 1887; decided October 4, 1887.)

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112	87
106	502
136	541
106	502
137	523

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment of the Court of Sessions of the county of Monroe, entered upon a verdict convicting the defendant of the crime of grand larceny in the second degree.

The facts, so far as material, are stated in the opinion.

P. Chamberlain, Jr., for appellant. As the proofs on the part of the people show a case of variance from that alleged in the indictment, the motion for the defendant's discharge should have been granted. (Code of Crim. Pro., §§ 275, 282; Penal Code, § 523; *People v. Moore*, 37 Hun, 84; *McGearey v. People*, 45 N. Y. 153; *People v. Wiley*, 3 Hill, 194; *People v. Stockland*, 1 Park. 424; *People v. Allen*, 5 Den. 76; 1 Russ. on Cr. 565; Roscoe's Cr. Ev. 95, 388; Whart. Cr. Law, §§ 285, 287, 298, 597; *Phelps v. People*, 6 Hun, 401; 72 N. Y. 334; *People v. Miller*, 12 Cal. 291; *People v. Poggi*, 19 id. 600; *People v. Jersey*, 18 id. 337; 3 Chitty on Cr. L. 967; *People v. Van Pelt*, 4 How. Pr. 36; 1 Phil. on Ev. 207; *Comm. v. McLaughlin*, 105 Mass. 460; *Frazer v. People*, 54 Barb. 306; *Thomas v. People*, 34 N. Y. 351; Cow. Cr. Dig. 320.) In all the cases of this character where the question has been raised upon the trial since the enactment of the Penal Code, the courts have held that the indictment must fully state the acts of the defendant which constitute the crime. (*People v. Reavey*, 4 N. Y. Cr. R. 1.) Before the Penal Code came into effect, the defendant's alleged offense would have been obtaining property by false pretense, or by a false writing or token, etc., and it would have been necessary to set forth the alleged false representation or writing in the indictment. Although the statute has made that crime larceny, the manner of alleging it in the indictment has not been changed, and, as before, the facts must be fully stated. (*Thomas v. People*, 34 N. Y. 351; *People v. Stetson*, 4 Barb. 151; *People v. Chapman*, 4 Park. 56; *Clark v. People*, 2 Lans. 329; Penal Code, §§ 530, 531;

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1 Chitty's Pleadings, 266; *People v. Fulle*, 12 Abb. [N. C.] 196; Roscoe's Ev. (5th Am. ed.) 816, 820; *Taylor's Case*, 1 Campb. 404; *Neudecker v. Kohlberg*, 81 N. Y. 296.) The defendant having purchased the property alleged to have been stolen by him, and it having been delivered to him voluntarily, and the title having passed absolutely to him, there being no written representations as to his means or ability to pay for the property, he could not be legally convicted of the crime of larceny. (Penal Code, § 544; *People v. Moore*, 37 Hun, 84.) If property is parted with voluntarily upon contract, the offense is not larceny. (Penal Code, § 528; *People v. Morse*, 3 N. Y. Cr. R. 104; *People v. Zink*, 77 N. Y. 114; *People v. Cruger*, 102 id. 510; *Mowry v. Walsh*, 9 Cow. 238; *Andrews v. Dietrich*, 14 Wend. 31; *Ross v. People*, 5 Hill, 294; *Smith v. People*, 53 N. Y. 111; *Thorne v. Turck*, 94 id. 90; *People v. Baker*, 96 id. 340; *People v. Kelly*, 3 Hun, 509; Cow. Cr. Dig. 320.)

George A. Benton for respondent. The indictment is sufficient within the requirements of the present rules of pleading, and there was no variance between it and the proofs. (Penal Code, §§ 2, 11, 528; Code Civ. Pro., §§ 275, 283-285; *People v. Cruger*, 38 Hun, 500; *People v. Willett*, 102 N. Y. 251; *People v. Phelps*, 72 id. 350; *People v. Moore*, 37 Hun, 84; *Leftwich v. Comm.* 20 Grat. 716, 719; *Dowdy v. Comm.*, 9 id. 729, 734; Code of Va. [1873], chap. 188, tit. 54, § 24; 19 Cal. 600; 18 id. 337; 12 id. 291; Penal Code, §§ 13, 951, subd. 3; General Laws 1850-1864, § 1826. [Hittell].) The statute defining larceny is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction; and an indictment charging larceny in the common law form, as does this, if sustained by evidence, justifies a conviction for larceny committed in any of the ways now known to the law. (*People v. Enoch*, 13 Wend. 176; *People v. White*, 22 id. 176; *Fitzgerald v. People*, 37 N. Y. 413, 426; *Kennedy v. People*, 39 id. 245; *Cox v. People*, 80 id. 500; *People v. Conroy*, 97 id. 62.) The question to the

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prosecutor whether he relied upon the representations made by the defendant was proper. (*People v. Sully*, 1 Sheld. 17.) Intent to restore the stolen property is no ground of defense or of mitigation of punishment, unless it is restored before complaint to a magistrate charging the commission of the crime. (Penal Code, § 549.) When the defendant undertook to prove the matters referred to by the people's witness, he made the witness his own for that purpose and was bound by the answers given. (*People v. Cox*, 21 Hun, 47.)

DANFORTH, J. The grand jury of Monroe county, by indictment, accused the defendant Dumar and one Hensler of the crime of grand larceny, committed (as therein alleged) as follows: "On the 3d of February, 1885, at Rochester," certain carpets and rugs (describing them), of the goods, etc., "of Ilus F. Carter, then and there being found, unlawfully and feloniously did steal, take and carry away contrary to the form of the statute in such case made and provided." Dumar was arraigned and pleaded not guilty. The record shows that the issue so formed was brought to trial, and the district attorney, in opening the case to the jury, as he was bound to do under section 388 of the Code of Criminal Procedure, said "the People would show that the defendant had committed the crime of grand larceny by obtaining from Carter certain personal property by false representations and a false writing," whereupon counsel for the defendant asked that he be discharged on the ground that the case so stated varied from the crime charged. The motion was denied. Evidence then given on the part of the plaintiff showed a sale and delivery of the carpets and other property by Carter to the defendant at the time stated in the indictment in consideration of \$742.81, in part payment of which the defendant gave ten dollars in cash and his two notes, each for \$350, payable at two and three months, respectively, leaving a balance due from him as stated upon the bill then rendered by Carter of \$32.81. But the evidence also tended to show that fraudulent pretenses and representations had been made as to certain

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securities given by him in order to induce the sale, and no evidence was given of any taking against the will of the owner, nor of the act as charged in the indictment, and at the close of the plaintiff's evidence a motion to discharge the defendant was again made upon the ground, among others, first, that the testimony on the part of the People fails to show that the crime of larceny has been committed as set forth in the indictment; and, second, that there is a variance between the proofs offered by the People and the allegations of the indictment." The motion was denied; and in submitting the case to the jury the learned trial judge instructed them that the crime charged in the indictment was made out if the defendant, "with intent to defraud and deprive the true owner of his property and to appropriate the same to his own use, obtained it from his possession by color or aid of fraudulent or false representations," saying "if, then, you shall come to the conclusion that the defendant did, on the third day of February last, obtain from Mr. Carter property of the value of over \$500 by reason, or through or by the aid of fraudulent or false representations or pretenses, then you shall find him guilty of grand larceny in the first degree," and of some lower degree, as they should find the value of the property. By proper exceptions to the charge the point made at the beginning of the trial was again presented.

The defendant was convicted of grand larceny in the second degree and duly sentenced. Upon appeal the conviction was affirmed by the General Term of the Supreme Court, and the defendant appeals. Many exceptions were taken upon the trial, not only to the course of procedure but the sufficiency of the evidence to establish any crime. They are not destitute of merit, but the only question we think it necessary to consider is one of pleading. Our conclusion as to that will dispose of the appeal. The indictment on which conviction was had was, as the learned counsel for the respondent says, good at common law. (Arch. Cr. Pr. and Pl., by Pomeroy, vol. 2, p. 1141.) It was also good under the Revised Statutes of this State defining larceny (2 R. S., 679, § 63; id. 690, § 1);

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but if the doctrine contended for by him as to the form of the indictment and evidence under it in cases of larceny committed in the various ways now known to the law, be admitted it would, in our opinion, not only lead us (1) to encounter known principles of natural justice which, in all criminal prosecutions entitle the accused "to be informed of the nature and cause of the accusation" (Bill of Rights, § 14); (2) to wholly disregard the general current of judicial authority in this State; and (3) to put aside the plain and explicit directions of the statutes by which the matters here involved are now regulated (Penal Code and Code of Criminal Procedure, *infra*). Under the former system a substantial distinction was recognized between the crimes of larceny (2 R. S., 679, § 63; 690, § 1), and false pretenses (2 R. S., 697, §§ 53, 54). In order to constitute larceny there must have been a taking of personal property against the will of the owner. The other offense could not be confounded with it. In either case the property may have been obtained by artifice or fraud; but if in one the owner intended to part with his property absolutely and to convey it to the defendant, but in the other intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself, the latter case would be larceny, but the former would not. It was, therefore, uniformly held that if a person, through the fraudulent representations of another, delivered to him a chattel intending to pass the property in it, the latter could not be indicted for larceny but only for obtaining the chattel under false pretenses.

In *Ross v. People* (5 Hill, 294), a conviction for larceny was reversed because the goods were delivered by the owner with the intention to sell them; and so having obtained them under a purchase, although by fraud and false pretenses, the purchaser could not be convicted of larceny. The distinction was adhered to, although with reluctance, and in deference only to earlier cases. The doctrine then applied was laid down before the adoption of the Revised Statutes in *Mowrey v. Walsh* (8 Cow., 238), and governed the courts of

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this State until the adoption of the Penal Code in 1881. (*Bassett v. Spofford*, 45 N. Y., 337; *Zink v. People*, 77 id., 114; *Thorne v. Turck*, 94 id., 90; *People v. Morse*, 99 id., 662.) And it is obvious that if these decisions apply, neither the opening of the district attorney nor the evidence put in by him, gave even color of support to the indictment, and it should not have been sustained. The indictment was for larceny as defined at common law, but concerning which, as above interpreted, no evidence was given, that crime, therefore, being left unproven, while the conviction was had upon proof of false representations, the making of which was not disclosed by the indictment. As to the act charged there was no proof; as to the act proved, no allegations.

But the Penal Code recognized that the moral guilt of the two offenses was the same and swept away the theory by which the courts had felt constrained to distinguish them in principle. By it larceny is so treated (chap. 4) as to include not only that offense as defined at common law and by the Revised Statutes (2 R. S., 679, 690), but also embezzlement, obtaining property by false pretenses and felonious breach of trust. We find in section 528 of that act certain acts enumerated, either one of which performed by any person with intent to defraud the true owner of his property, or of its use or benefit, or to appropriate the same to the use of the taker or of any other person, makes him guilty of larceny, and he, in the language of the Code, "steals" such property. The crime is committed when with that intent a person either, *first*, takes such property from the possession of the true owner or of any other person; or, *second*, obtains it from such possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or, *third*, secretes, withholds or appropriates to his own use or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind. * * * The second or following subdivision takes in a person occupying a place of trust or holding a fiduciary or semi-fiduciary relation to

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another person, and who under other statutes would have been guilty of embezzlement or breach of trust (2 R. S., 678, §§ 59, 60; Laws of 1865, chap. 720; Laws of 1864, chap. 955; Laws of 1873, chap. 688; Laws of 1874, chap. 207; Law of 1877, chap. 208); and it declares that he upon converting the property of that other person, also "steals such property and is guilty of larceny." We see, therefore, that there are at least four distinct and separate acts or ways by which a person may commit or be guilty of larceny. The first embraces larceny as described at common law and under the Revised Statutes (*supra*); the second embraces the offense formerly known as obtaining property by false representations. In substance the defendant has been indicted for larceny in doing the first act, and has been convicted of larceny in doing the second. From what has already been said and the cases cited, it appears that, under the former system, concerning crimes and punishments prevailing in this State, the conviction could not be sustained. The variance between the indictment and proof would be fatal. The respondent relies, however, upon the system introduced by the Code of Criminal Procedure (Laws of 1881, chap. 442; Laws of 1882, chap. 360). That statute abolishes all the forms of pleading before existing in criminal actions, and enacts that the forms of pleading and the rules by which their sufficiency shall be determined, are those prescribed therein (§ 273). It declares that on the part of the People the first pleading is the indictment (§ 274), and defines this pleading as an accusation in writing charging a person with a crime (§ 254). It must contain a plain and concise statement of the act constituting the crime, without unnecessary repetition (§ 275). The indictment, therefore, must charge the crime, and it must also state the act constituting the crime. The omission of either of these things would necessarily be fatal to the indictment. If there was no accusation of a crime, the paper, however formal in other respects, would not be an indictment, and so there would be no criminal action. If it contained no statement of the act constituting the crime, there would be no descrip-

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tion of the offense, and neither an acquittal nor a conviction would enable the defendant to withstand a further prosecution for the same crime. Moreover, the plain words of the statute, as well as its object, would be disregarded; for the manifest intention of the legislature in requiring the indictment to state the act constituting the crime was, among other things, that the accused should learn from it what he was called upon to defend. The form of the indictment given in the Code (§ 276) leads to the same conclusion.

It provides in one sentence for a statement of the name of the crime as murder, larceny, etc., whereof the grand jury accuse the defendant, or, if it be a misdemeanor having no general name, such as libel, assault, etc., requires an insertion of a brief description of it as given by statute, and then adds, "here set forth the act charged as an offense." It provides also that "the indictment must charge but one crime and in one form, except where it may be committed by different means (§ 278), in which case the crime may be charged in separate counts to have been committed by different means (§ 279), and declares "the indictment sufficient if it can be understood therefrom that the act or omission charged as the crime is plainly and concisely set forth."

We see, therefore, that the indictment must name the crime and state the act constituting it, and if either one of several acts constitutes the crime, the several acts must be separately stated in different counts. Can the indictment before us be supported as complying with these provisions? It consists of one count. It accuses the defendant of the crime of grand larceny in the first degree, and then states with sufficient conciseness an act constituting the crime by saying the defendant "unlawfully and feloniously did steal, take and carry away" the property therein described. These words are to be construed in their usual acceptation in common language, except such as are defined by law, and those are to be construed according to their legal meaning (§ 282). Undoubtedly, under the Penal Code, the offense or crime charged is sufficiently made out by these averments. But the act described was

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not proven There was neither expectation nor intention on the part of the plaintiff to prove it. This we know from the opening of the district attorney. The case he presented and the evidence he offered all tended to show that the defendant did not commit the act charged in the indictment, but did commit the act described in the second alternative of the statute, viz.: "Obtaining property from the possession of the true owner by color or aid of false representations or pretense, or a false token or writing." And such is the only claim now made by the learned district attorney. He says, in his printed points, given to us as an answer to the appeal: "On the trial it was proven that on the 3d day of February, 1885, the defendant obtained from Ilus F. Carter a quantity of carpets of the value of about \$700; that he obtained such carpets by means of false and fraudulent representations."

The accused could not fail to understand, from the indictment, that he was charged with the crime of grand larceny. In that respect the Code was complied with. It stated, also, a particular act as constituting the crime. In that respect, also, the Code was complied with. The difficulty is that the act stated was not proven, and that the act proven was not stated. The objection that the proof varied from the crime charged in the indictment was, therefore, well taken. It related to substance and not form, and pointed to an imperfection which tended to prejudice the substantial rights of the defendant upon the merits. It must prevail.

The learned counsel for the respondent cites *People v. Willett* (102 N. Y., 251), as substantially settling in his favor the present contention. In that case a very different question was involved, the sufficiency of an indictment upon demurrer. Here is a question of variance between the indictment and the proof. So far as the first involved the crime of larceny it was well charged; and so it is in the case under consideration, but it remains unproven. The important difference between the former law and the present, so far as this case is concerned, is that the court is no longer called upon to decide whether an offense is larceny, embezzlement or false pretenses,

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nor is justice liable to be defeated by too nice a discrimination. Each of these acts is larceny. But the general principle of pleading has not been substantially changed. Under either system an offense consists of certain acts done or omitted under certain circumstances, and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense. Under the former this end was secured by rules formulated and applied by the courts through long series of decisions; under the latter it is made imperative by the provisions of the statute.

In the case at bar the defendant was left uninformed of the real act committed by him and subjected to the charge of larceny for an act which he did not perform. The variance is fatal to the proceeding.

The judgment of the court below and the conviction should, therefore, be reversed, and a new trial ordered.

All concur, except RUGER, Ch. J., not voting.

Judgment reversed.

THOMAS CAHILL, Respondent, v. HENRY HILTON, et al.,
Appellants.

To authorize a recovery in an action by a servant against his master for injuries received by the former in the course of his employment, the evidence must establish personal fault on the part of the master, or, what is equivalent thereto; and he is entitled to the benefit of the presumption that he has performed his duty, until the contrary is shown. So, also, the plaintiff is required to show affirmatively his own freedom from negligence; and while this is usually a question of fact and the absence of contributory negligence is often to be inferred from the nature of the accident and the circumstances of the case, that conclusion cannot legally be reached, unless such circumstances are proved as legitimately and reasonably lead to such a result; and if the facts proved do not fairly tend to support a presumption of freedom from negligence, the question becomes one of law for the court.

106	512
140	458
106	512
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In an action to recover damages for personal injuries alleged to have been caused by defendants' negligence, the following facts appeared: Plaintiff was employed as general helper in the gig room of defendants' carpet factory. The superintendent and the foreman of the factory had been expressly directed by the defendants not to allow the machinery to be repaired while in motion. The gigs were operated by leather belts running over drums or pulleys. One of the belts, the laces of which had become loose, had been thrown off the gig-wheel and was dangling from the shaft overhead. Plaintiff was requested by a fellow-workman to place the belt upon nails driven near the shaft for the purpose of stopping its revolution so that it could be relaced. A ladder, which had been in general use about the factory for a number of years, was, at the time, fastened by hooks to a scantling, and was so situated as to enable plaintiff to reach the belt from it. He testified that he ascended the ladder, placed his right arm around a beam near his head, seized the belt with his left hand and attempted to lift it to throw it over the nails when he became unconscious. The belt was revolving toward him and downward. Plaintiff was found lying unconscious upon the floor at the foot of the ladder, the ladder and the scantling were broken and lay in pieces on the floor, around and partly upon him. Plaintiff's left arm was severed from the body and was found lying on the floor from six to ten feet from it and back of the shaft. There was no necessity for lacing the belts while the machinery was in motion; it had been at rest during the noon intermission and the accident happened immediately after it had again been put in motion. Plaintiff admitted that he had frequently performed this service before and always in the same manner, and that he knew it to be a hazardous undertaking. The claim of negligence was that the ladder was defective; there was no proof that defendants were aware that it was used for such a purpose. *Held*, the evidence clearly showed the injury did not result from any defect in the ladder; but if so, plaintiff alone was chargeable with negligence in electing to perform the service in a way known by him to be dangerous, rather than adopt the precautions which would have made it entirely safe.

(Argued June 10, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal

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injuries alleged to have been caused by defendant's negligence. The material facts are stated in the opinion.

Frank B. Lown for appellants. It is no answer to plaintiff's negligent or careless act to say that he was ordered to do it by Broderick, the foreman, who was a fellow-servant of the plaintiff, and for his negligence the defendants are not liable. (*Crispin v. Babbitt*, 81 N. Y. 516; *Slater v. Jewett*, 85 id. 61; *McCosker v. L. I. C. R. R. Co.*, 84 id. 77; *Olson v. Clyde*, 32 Hun, 425; *White v. Sharp*, 27 id. 96.) The judgment cannot be supported on the ground that the defective ladder caused the accident. (*Marsh v. Chickering*, 101 N. Y. 396; *Davies v. Detroit & Mich. R. R. Co.*, 20 Mich. 185; *Baker v. Alleghany R. R. Co.*, 23 Alb. L. J. 96; *Ballou v. Chic. & N. W. R. R. Co.*, 26 id. 137.) A master does not engage that his appliances will continue in good and safe condition. (*Baker v. A. V. R. R. Co.*, 23 Alb. L. J. 96; *White v. Sharp*, 27 Hun, 97.) The cause of the injury to plaintiff was left in such doubt that a verdict in his favor could not be sustained. (*Searles v. Manhattan R. Co.*, 101 N. Y. 661.) *Hart v. H. R. Bridge Co.*, 84 id. 56.) A servant is chargeable with knowledge of a dangerous structure or machine if he could have known of it by the exercise of reasonable care and observation. (*Hickey v. Taffe*, 105 N. Y. 26; *Gibson v. E. R. Co.*, 63 id. 449; *De Forest v. Jewett*, 88 id. 268; *Kelly v. Silver Springs Co.*, 18 Alb. L. J. 354; *Jones v. Roach*, 9 J. & S. 248; *Brossman v. L. V. R. R. Co.*, 10 East. Rep. 262; *Wonder v. B. & O. R. R. Co.*, 5 Alb. L. J. 187; 3 Am. Rep. 143; *Ballou v. Chic. & N. W. R. R. Co.*, 26 Alb. L. J. 137; *Baker v. Alleghany R. R. Co.*, 23 id. 96.)

Austen G. Fox for respondent. There was sufficient evidence to support the finding by the jury that the defendants were guilty of negligence. (*Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; *Kain v. Smith*, 89 id. 375; *Painton v. N. C. R. R. Co.*, 83 id. 7; *Spicer v. S. Bost. Ice Co.*, 138 Mass. 426; *Murphy v. Phillips*, 35 L. Times, 477; *Covey v. H. & St. Jo. R. Co.*, 86 Mo. 635; *Ryan v. Miller*, 17

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Week. Dig. 112; *Baker v. A. V. R. R. Co.*, 95 Penn. St. 211; *Ryan v. Fowler*, 24 N. Y. 410; *Hough v. R. Co.*, 100 U. S. 213; *Jones v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 628; 28 Hun, 364; *Rooney v. Com. Gen. Transp.*, 10 Daly, 241; *Heaven v. Pender*, 11 Q. B. D. 503; *Heske v. Samuelson*, 12 id. 30; *Bartonshill v. Reed*, 3 Macq. H. L. Cas. 266; *Roberts v. Smith*, 2 H. & N. 213; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, 533; *Buzzell v. Laconia Man. Co.*, 48 Me. 113-117; *Ballou v. C. & N. W. R. R. Co.*, 54 Wis. 257; *Behm v. Armour*, 58 id. 1; *Marsh v. Chickering*, 101 N. Y. 369.) There was sufficient evidence to support the finding by the jury that the plaintiff was not guilty of contributory negligence. (*Hawley v. N. C. R. R. Co.*, 82 N. Y. 370; *Kain v. Smith*, 89 id. 375; *Connolly v. Poillon*, 41 Barb. 366; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *McMahon v. Pt. H. I. O. Co.*, 24 Hun, 48; *Plank v. N. Y. C. R. R. Co.*, 60 id. 607; *Baker v. A. V. R. R. Co.*, 95 Penn. St. 211; *Lawless v. Conn. R. R. Co.*, 136 Mass. 136; *Wood on Mast. and Serv.* 749, § 376.) The question whether the breaking of the defective ladder caused the injury, was not raised on the record, but even if it had been raised, the evidence was sufficient to support the finding of the jury that the cause of the accident was the breaking of the defective ladder. (*Stringham v. Stewart*, 100 N. Y. 516; *Rollins v. Farley*, id. 620; *Hart v. H. R. B. Co.*, 80 id. 622; *Durkin v. Sharp*, 88 id. 225; *Jones v. N. Y. C. & H. R. R. R. Co.*, 92 id. 628; 28 Hun, 364; 10 Abb. [N. C.] 200; *Kain v. Smith*, 89 N. Y. 375; *Ford v. Lyons*, 25 Week. Dig. 39.) The court did not err in refusing to charge either the first or the sixth request submitted by the defendants having already substantially charged them. (*Holbrook v. Utica & S. R. R. Co.*, 12 N. Y. 236; *Moett v. People*, 85 id. 373, 380; *Masterson v. N. Y. C. & H. R. R. R. Co.*, 84 id. 258; *R. Co. v. McCarthy*, 96 U. S. 258; *Wabash R. Co. v. McDaniels*, 107 id. 462.) The knowledge on the part of a servant that shows negligence, as matter of law, is not the mere knowledge of defects, but of the risks or dangers arising therefrom, for,

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"a servant knowing the facts may be utterly ignorant of the risks." (*Kain v. Smith*, 89 N. Y. 375; *McMahon v. Port Henry I. O. Co.*, 24 Hun, 48; *Ford v. Fitchburgh R. R. Co.*, 110 Mass. 240; *Hawley v. N. C. R. R. Co.*, 82 N. Y. 372; *Plank v. N. Y. C. R. R. Co.*, 60 id. 607; *Baker v. A. V. R. R. Co.*, 95 Penn. St. 211; *Lawless v. C. R. R. Co.*, 136 Mass. 1; *De Forest v. Jewett*, 88 N. Y. 269.) The court did not err in refusing to charge "that if the plaintiff had equal opportunity with the defendants to know of the condition of the ladder, then he cannot recover." (*Wood on Mast. and Serv.* § 376; *Wilson v. Wil. Linen Co.*, 50 Conn. 469.)

RUGER, Ch. J. The accident by which the plaintiff lost an arm and seriously impaired his means of livelihood, was one which appeals strongly to the sympathies, and naturally excites a desire to extend compensation to him for his misfortune. Courts, however, are powerless to render relief in such cases unless the consequences can be traced with certainty to the negligence of the parties charged therewith, unconnected with contributory fault on the part of the injured party.

Persons engaged in the use of machinery employed in the various manufacturing industries of the country, and usually propelled by irresistible power, are necessarily exposed to great danger, and must mainly rely for immunity from injuries therefrom, upon their own care and vigilance. It is undoubtedly the duty of the master employing servants in such establishments, to exercise all reasonable care and prudence to obviate the dangers naturally arising from the employment, but there must remain many dangerous situations which cannot be anticipated or provided for, and from which the utmost care of the employer will be insufficient to protect his servants, and especially those who are careless or inattentive in the performance of their duties. Even when the employer is held to the strictest degree of accountability, there must necessarily be cases when accidents occur that are beyond the reach of any possible prevision, and are chargeable solely to the

risks incident to the nature of the employment, or the fault of the person injured. This seems to have been such a case. A master's liability to his servants for injuries received in the course of his employment is based upon the personal negligence of the employer; and the evidence must establish personal fault on his part, or, what is equivalent thereto, to justify a verdict, and he is entitled to the benefit of the presumption that he has performed his duty until the contrary appears. (Wood on Master and Servant, §§ 345, 346.)

An examination of the evidence in this case does not, in our view, disclose any neglect on the defendants' part, but seems to prove that the accident was occasioned by plaintiff's want of care. The defendants were the owners of a carpet factory at Glenham, in this State, and the plaintiff had been in their employ about four years as a general helper in the gig-room where the accident occurred. The plaintiff was the only witness of the transaction and was entirely unable to give any account of the manner of its occurrence. The courts below have sustained a recovery against the defendants solely upon the ground that they were guilty of negligence in furnishing for use in their factory, a ladder alleged to have been defective in some of its parts, and which the plaintiff was using at the time of his injury, in attempting to shift a belt upon a shaft for the purpose of relacing it. There was no necessity for relacing these belts while the machinery was in motion, and no proof that the ladder was furnished for the purpose to which plaintiff put it, or that the defendants were aware of the manner in which he intended to use it. On the contrary, the superintendent and foreman of the factory had been expressly directed by the defendants not to allow the machinery to be repaired while in motion, and they both testified that they should have prevented it if the mode of doing it by the plaintiff had been brought to their attention. The ladder was about twelve feet long and had been provided for no special purpose, but had been used some fifteen years about the factory for the ordinary uses of such a ladder. The plaintiff testified that he and his fellow-servants had been in the

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habit, during the four years he worked in the factory, of relacing the belts in the gig-room while the machinery was in motion as often as once in every two or three months, but knowledge of this practice had not come to the notice of the defendant.

The evidence of the defects in the ladder was furnished mainly by the plaintiff's co-servants, and they were evidently aware of the difficulty of the problem their evidence was designed to elucidate, viz., to show that the defects were so apparent that the defendants were chargeable with negligence for not observing them, but that they were also so obscure that the plaintiff, who was in the frequent use of the ladder, was excusable in not seeing them. The plaintiff's means of discovering these defects, if there were any, were quite equal to those of any of his witnesses, but the jury were permitted to find, upon such evidence, that the defendants were chargeable with negligence for not discovering and remedying them, and that the plaintiff, with superior means of observation, was ignorant of their existence.

It is difficult to see upon what principle of logic or reason such a verdict can be supported. A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections. (*Marsh v. Chickering*, 101 N. Y. 396.)

We do not, however, care to rest the decision of the case upon this proposition, as we are, after a careful consideration of the whole evidence, of the opinion that the ladder was not instrumental in producing the accident; and that even if it was, the mode and time of its use were not attributable to the defendants. The evidence upon which our opinion is based was undisputed, and when carefully analyzed leaves no room for doubt as to the manner of the accident, or at least that it was not occasioned by the breaking of the ladder. The gig room was mainly occupied by gigs located upon the

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floor and operated by leather belts running over drums or pulleys on a main shaft extending through the room near the ceiling and passing around other drums or pulleys attached to the gigs, thus communicating power to them. The machinery on the floor was covered up and offered no apparent opportunity for injury therefrom, even to those who should be brought in contact with it. Upon this occasion the plaintiff was requested by a fellow-servant to place one of the belts upon nails driven into scantling near the shaft for the purpose of stopping its revolution and enabling it to be relaced. This belt was a plain, smooth band of leather, about six inches wide, and made to form a circle by having its two ends brought together and laced with a leather string. These laces occasionally became loose or broken and had to be relaced or refastened. The plaintiff went alone to the place of the accident and found the belt thrown off the gig wheel and dangling from the shaft above, around which it was revolving with considerable velocity. He found the ladder fastened by hooks to a scantling near the ceiling, so placed as to enable him easily to reach the hanging belt with his left hand and to throw it upon the nails. He ascended the ladder and placed his right arm around a beam near his head, giving him a secure position, and seized the belt with his left hand and attempted to lift it, but failed. He made a second attempt, but before he could throw it over the nails became unconscious and recollected nothing further.

The belt was revolving toward him and downward as he stood on the ladder, and would naturally carry him with it in case he became entangled in it, and his hold upon the beam above became released. He admitted that he had frequently performed this service before and always in the same manner and with the same ladder, and that he knew it to be a hazardous undertaking. Another witness, who worked in the same room, testified that he heard a crash, and upon investigation found the plaintiff lying upon the floor at the foot of the ladder in front of the shaft, and unconscious. The ladder and the scantling to which it was hooked, were broken and

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lay in pieces on the floor around and partly upon the plaintiff. The left side of the ladder was broken and some of the rounds were pulled out and also broken. The plaintiff's left arm had been severed from the body near the shoulder and lay on the floor, back of the shaft and from six to ten feet from his body. In the absence of any direct evidence of the manner in which the accident occurred we are left wholly to conjecture to account for its cause. We can see nothing in the circumstances of the case which tends to impose upon the defendants the charge of a want of due and proper care. There was nothing about this machinery which was dangerous in itself and no injury could reasonably be apprehended from it unless a person voluntarily placed himself within its range. The defendants had no reason to suppose that their servants would expose themselves unnecessarily to a danger that was so apparent to observation. The plaintiff's theory of the accident is that the ladder broke on account of its defective material and precipitated him upon the belt, thus causing his entanglement therein. This theory is not only improbable and unnatural, but is contradicted by every reasonable inference to be drawn from the known circumstances of the case. It does not account for the fact of the broken scantling to which the ladder was fastened, nor the respective positions of the body and the arm after the accident, nor even for the breaking of the arm. The position in which the body was found is irreconcilable with the theory that the broken ladder was the cause, and clearly demonstrates that it was the consequence only of the accident. The body seems to have fallen in accordance with the law of gravitation, and appeared to be unaffected in its fall by any exterior force. It is only upon the theory that the arm was broken off while the body still remained upon the ladder suspended from the beam around which the right arm was thrown, that the relative positions of the arm and body can be accounted for. There is not only no evidence that his body caught or was thrown into the belt, but the most conclusive presumption arises from its position and the nature of the belt, that it was not brought

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into contact with the belt at all. His own evidence placed him upon the ladder in the act of grasping a revolving belt having laces with loosened ends attached to it thus affording the only apparent means of creating any entanglement. Thus a probable and natural mode of accounting for the accident was furnished by the proof, but, for the purpose of fixing a liability upon the defendants, the jury were allowed to speculate upon the possibilities of the case, without any evidence to support the theory upon which the defendant's liability was predicated. The circumstances show conclusively that his hand alone was caught in the laces, and that the arm, ladder and scantling were all broken by the strain upon them, and the arm pulled off owing to the resistance which his grasp on the beam over his head afforded. This hold was not relaxed until the shock severing the arm had produced unconsciousness, when the body fell to the floor in front of the belt.

The inference is irresistible that the hand became entangled in the belt while he was engaged in the act of lifting it, and that the severance of his arm immediately followed, communicating the shock which produced unconsciousness. If the ladder had broken and caused him to fall, that circumstance must have preceded his unconsciousness, and he would have observed and been able to testify to the fact; but as it was he recollected all that took place up to the time of grasping the belt, but nothing after that. It is quite certain that the arm was severed from the body while he still remained upon the ladder holding to the beam above him for support, because there was no period of time after that when the force exerted upon it would not have carried the body, if undetached, along with it to the other side of the shaft. The force necessary to tear an arm from the body requires resistance as well as power, and can be accounted for in no way except upon the theory that the plaintiff held on to the beam, endeavoring, by main strength, to release his hand from the laces.

The evidence, therefore, does not bring the case within the rule requiring that personal negligence on the part of the employers must be shown in order to authorize a verdict

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against them. They not only did not furnish the ladder for the use in which it was employed, but the accident was not attributable to its use.

The rule that a plaintiff in an action for negligence is required to show affirmatively his own freedom from negligence, is quite as well established, as that he must show that it was produced by the negligence of the defendant. It is quite true that the proof of the absence of plaintiff's negligence usually presents a question of fact, and is often to be inferred from the nature of the accident and the circumstances of the case, but this conclusion cannot legally be reached unless such circumstances are proved as legitimately and reasonably lead to such a result. Unless the court can see that such facts are proved as fairly tend to support a presumption of freedom from negligence, the question becomes one of law to be determined by it.

The proof shows that the service in question could have been safely performed while the machinery was at rest during the noon intermission, or upon request the superintendent would have suspended the power for the few minutes required to perform the work. Instead of adopting either of these methods, the plaintiff and his fellow-servant voluntarily selected a time following the noon intermission, and immediately after the machinery had been put in motion, to do the work required of him. He admits that he knew the hazard of this manner of performing the service, but he elected to do it in that way rather than adopt the precautions which would have made it entirely safe. In this we think he took the risk of the time and manner selected by himself and his co-servant.

To hold an employer liable for the consequence of an accident happening under such circumstances, would violate the plainest principles governing the relations of master and servant, and impose upon the former the consequences of the carelessness of the latter. It would substitute a rule imposing an absolute liability upon the master, instead of that just principle which inflicts upon each party the consequences of his own fault.

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The judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
DAVID C. JONES, Appellant.

Upon the trial of an indictment for forgery in signing fictitious names, as maker and indorser of a note, and procuring the discount of the same as a genuine note, H., a witness for the prosecution, after he had testified that he indorsed the note, in reliance upon representations on the part of the defendant that the maker and indorser were responsible farmers living in a locality specified by defendant, was permitted to testify to what he did in searching for the maker and indorser, and the result thereof; also, that he examined the assessment-roll of the town and found no such names thereon. *Held*, no error.

The court, in passing upon the question as to the admissibility of such testimony, stated that any conversation between the witness, and any person he talked to while engaged in the search, would not be allowed. *Held*, the fact that the witness in answering did state, in some cases, the responses made to his inquiries, was not a ground for an exception as the testimony was not called for; that if defendant's counsel desired to have it stricken from the record he should have made a motion.

Upon cross-examination of the cashier of the bank where defendant had the note discounted, questions were asked as to the dealings between defendant and H., and as to how many notes indorsed by H. for defendant had been paid by him or by H. Thereafter H. was asked, as a witness for the prosecution, how much money he had had to pay for defendant. The court overruled an objection thereto on the ground that defendant's counsel had gone into the subject on the cross-examination of the cashier. *Held*, no error.

(Argued June 13, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 25, 1887, which affirmed a judgment of the Court of Sessions of the county of Erie, entered upon a verdict convicting the defendant of the crime of forgery in the second degree.

Opinion of the Court, per PECKHAM, J.

The facts, so far as material to the questions discussed, are stated in the opinion.

Tracy C. Becker for appellant. Proof by the People that inquiries had been made some time after the shipment, about the alleged fictitious firms at the place to which the goods were shipped, and it could not learn that any such firms or persons existed, was improperly received. (*Wiggins v. People*, 4 Hun, 540.) Defendant's motion to be discharged for want of sufficient evidence, and his motion in arrest of judgment, after the verdict of the jury had been rendered against him, should have been granted. (Code Cr. Pro., § 465, subd. 6.)

George T. Quinby for respondent. Where a witness has testified that he has made inquiries and search for certain people, it is not necessary to call the persons of whom the inquiries were made. (*Key v. Shaw*, 8 Bing. 320; *Morgan v. Morgan*, 9 id. 359; *Bartlett v. Decreel*, 4 Gray, 111; *Shott v. Streatfield*, 1 M. & R. 8; *Whitehead v. Scott*, id. 2; *Phelps v. Foot*, 1 Conn. 387.)

PECKHAM, J. The defendant was indicted for the crime of forgery in the second degree, in having signed the name Peter Hint as the maker and Samuel Main as the indorser of a promissory note for \$425, and falsely pretending that the note was subscribed by said Hint and indorsed by said Main, whereas, in truth, Hint and Main were persons not in existence, and the signatures were not those of any persons in existence, he, Jones, well knowing the same, with intent, etc.

Upon the trial, evidence was given by the cashier of a bank in Buffalo that the defendant came to the bank, of which the witness was cashier, in company with a friend named Hun, and desired to get the note in question discounted. The cashier said he would if Mr. Hun would indorse it, which he did, and then the note was discounted, and the defendant got the money. The cashier knew Mr. Hun, and that he was responsible. Jones gave the witness the residence of the indorser as North Oakfield, N. Y., and his own as North

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Pembroke, but he could not say what residence, if any, he gave for the maker. The note was payable at a bank in Batavia, and was protested when due for non-payment, and was then taken up by Mr. Hun, the second indorser. Mr. Hun swore that the defendant told him before he indorsed the note, and in answer to questions he put to the defendant, that the maker, Peter Hint, was a good farmer, living just through the swamp, and the indorser lived directly across the road from his father-in-law, Mr. Hint, and that he was also a good farmer. Continuing, the witness said: "I asked him whereabouts through the swamp he lived; he said just through the swamp; I asked him again where; then I used the remark, on the Lewiston road; he said yes; I then indorsed the check." The swamp was the Tonawanda swamp, and Hun lived eight or nine miles from it, and he stated where the Lewiston road ran, and that it went through the swamp. The note not being paid at maturity, the indorser Hun started out to look for the maker and the first indorser, and went into the swamp and struck the Lewiston road, and came around making inquiries for them, or either of them. The district attorney then said: "Tell the jury what you did, commencing at the beginning; the first thing, and tell them all that you did. Objected to by counsel for the defendant, on the ground that it was immaterial and irrelevant. By the Court. — He may state what he did; what means he took to find the maker and indorser of this note; what he did in that direction. Exception by defendant."

The court again said at another time that it would not allow any conversation between the witness and anybody he talked with, but he might state the fact that he had a talk, and that he could get no information. Under this ruling the witness detailed his efforts at finding these men; that he visited the vicinity where they were stated to have resided and made inquiries but failed to obtain any information concerning them. Under objection and exception he also said he had looked over the assessment-rolls of the town and found no such names. All this was legiti-

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mate evidence of facts from which, in connection with other evidence in the case, the jury were asked to infer the main fact that there were no such persons there resident. The evidence as to the assessment-rolls did not call for the contents thereof within the rule for proving the contents of written instruments by producing them. It was evidence of the same kind already given, and was merely a description of what the witness did in making his search and a statement of the result. It was an incidental and collateral fact. The whole evidence was given and received under the ruling of the court for the purpose of showing what the witness did himself, and not to prove the statements made by persons to whom the witness put his questions. In this respect the case differs from that cited on the argument of *Wiggins v. People* (4 Hun, 540), where evidence of such answers was permitted and the conviction may have been placed entirely upon it. The questions put to the witness here by the district attorney were only calculated to bring out a statement of the extent of the search made by him, and if, in answer thereto, one or two isolated remarks were made by the witness as to the response made to his inquiries, they were not asked for, were not responsive to the question and were ruled distinctly and plainly by the trial judge to be improper. If the counsel for defendant desired to have them stricken from the record, he should have made his motion, and it would undoubtedly have been granted in accordance with the rule already laid down and acted upon by the judge. We do not see that any error in this part of the case was committed.

When Mr. Hun was on the stand he was asked how much money he had had to pay for Mr. Jones. The evidence was objected to and admitted under the exception of the defendant's counsel. Upon the cross-examination, by defendant's counsel, of the cashier of the bank where defendant had the note discounted, the question as to the dealings between defendant and Hun had been somewhat investigated, and as to how much of the various notes indorsed by Hun for defendant had been paid by defendant or Hun. There was

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enough of the subject then touched upon to permit this inquiry. The court placed its ruling on that ground, stating to counsel that he had himself gone into it on the cross-examination of the cashier, and we think that in such ruling there was no error.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HUMPHREY E. WOODHOUSE et al., Respondents v. JACOB M.
DUNCAN et al., Appellants.

Where a charter-party is not under seal it is competent to prove, by evidence *aliunde*, that the charterers named therein, and who executed it, did so not only for themselves but also for others who were jointly interested with them as principals; and an action is maintainable thereon against all the parties so interested.

In an action upon a charter-party it appeared that it was executed by defendants, D. & P., on behalf of themselves and the other defendants who were jointly interested with them as charterers. The answer set up, as a counter-claim, damages alleged to have resulted from a breach of an agreement in the charter-party on the part of plaintiffs. On the trial plaintiffs gave in evidence the judgment record in a suit in admiralty brought by D. & P. against the vessel and its owners to recover damages for the same alleged breach of contract. The record showed the libel was dismissed on the ground that the owners "had kept and performed all the covenants and undertakings in the said charter-party contained on their part." *Held*, that the said judgment was conclusive, not only against D. & P., but upon those whom they represented and who were in privity with them, although they were not made parties. The answer alleged that three other persons were interested with defendants in the adventure and were necessary parties. It appeared that the three persons named had some interest, but it did not appear that plaintiffs knew of it at the time the charter-party was executed, nor was it proved that the interest was that of partners or joint contractors with defendants. *Held*, that the omission to make the three persons specified defendants was not a sufficient ground for reversal; that if at the time of making the contract the persons named were not known to plaintiffs to be joint contractors, it was not necessary to make them parties;

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that it was not sufficient to show that plaintiffs knew said persons had some interest in the adventure; it was requisite to prove knowledge that they were members of a firm or joint contractors, with defendants.

(Argued June 14, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

R. D. Benedict for appellants. The overruling of the defense of non-joinder by the court, was clearly erroneous. If, at the time of the contract, the creditor knows his debtor has a partner, or knows he has a "dormant partner," and the non-joinder is objected to, and such other partner is not joined, "it will be left with the jury to say with what parties the contract was intended to be made." (*Cookingham v. Lasher*, 1 Abb. Ct. of App. Dec. 438; Collyer on Part., § 719.) The true test is whether or not the defendants gave the plaintiffs reasonable grounds for believing that the defendants were the only parties interested in the venture. (Collyer on Part., § 720; 2 id. [6th ed.], 1057, § 720, *n.*; *Bonfield v. Smith*, 12 M. & W. 405, 407, 409; *De Muutort v. Sanders*, 1 B. & Ad. 401.) As the plaintiffs knew at the time of the contract that there were other parties interested, the defendants were entitled to a dismissal of the complaint. (*Newman v. Marvin*, 12 Hun, 236.) As the credit was by agreement given by the plaintiffs to Duncan & Poey alone, plaintiffs are bound by their assent to this arrangement. (*Patterson v. Ganda sequi*, 15 East, 62; *Meeker v. Claghorn*, 44 N. Y. 349; Story on Agency, § 447.) If an agent informs a party with whom he has dealings that he is acting for a principal, and at the same time credit is given to the agent with the consent of the latter, the creditor cannot thereafter charge the principal. (*Page v. Stone*, 10 Metc. 160; *Bate v. Burr*, 4 Harr. 130;

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Coxe v. Devine, 5 id. 375; *Ahrens v. Colt*, 9 Humph. 643; *Ranken v. De Forest*, 18 Barb. 143; *Ins. Co. of Penn. v. Smith*, 3 Whart. 520, 528; *Truthill v. Wilson*, 90 N. Y. 423; 2 Smith's Lead. Cas. pt. 1, p. 427.)

William Allen Butler for respondents. The objection made by the defendants at the trial to the introduction of the record on the ground "that it was not a suit between the same parties" was properly overruled. (*Goodrich v. City*, 5 Wall. 566; *Taylor v. Royal Saxon*, 1 Wall., Jr. 333; *Dunham v. Bower*, 77 N. Y. 76, 79.) The whole merits of the defense, based on the alleged breach of the charter-party, having been litigated and adjudged between the parties to this action in the former suit, the evidence offered at the trial to show damages for the breach alleged in the answer was properly excluded. (*The Francis Wright*, 105 U. S. 381, 391.) All are bound by a judgment who had a right to be heard therein, and all who are in privity with them, and all who are bound by a judgment, are entitled to the benefit of it against the parties to it, or their privies. (Greenl. on Ev., §§ 522, 523; *Duchess of Kingston's Case*, 2 Smith L. C. 424; 20 State Trials, 528; *Embury v. Conner*, 3 N. Y. 511; *Castle v. Noyes*, 14 id. 329; *Tuska v. O'Brien*, 68 id. 446; *Church v. Kidd*, 88 id. 652; *Craig v. Ward*, 3 Keyes, 387; *Dunbar v. Bower*, 77 id. 76; *Leavitt v. Wolcott*, 95 id. 212.) The court, at the trial, properly rejected the evidence offered by defendants to prove statements and representations made by plaintiffs before the signing of the charter-party, as to the condition of the steamer, or her rate of speed. (*Hendricks v. Decker*, 35 Barb. 298; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Still v. Little*, 63 id. 427; *Oberlander v. Spiess*, id. 175; *Duffany v. Ferguson*, 66 id. 482, 484.) The fact that the charter-party was signed by the defendants Duncan & Poey alone, did not prevent plaintiffs from proving, by parol, that the other defendants were interested. (*Briggs v. Partridge*, 64 N. Y. 357, 362; *Nicoll v. Burke*, 78 id. 580; *Hill v.*

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Miller, 76 id. 32.) There was no error in the rulings of the court as to the non-joinder, as defendants, of the three persons who were interested in the venture, but whose interest was not disclosed, and was unknown to plaintiffs when the action was commenced. They were not necessary parties. (*Leslie v. Riley*, 47 N. Y. 648, 652; *North v. Bloss*, 36 id. 374; *Brown v. Birdsall*, 29 Barb. 549, 550; *Marvin v. Wilber*, 52 N. Y. 270; *Farwell v. Davis*, 66 Barb. 73; *Arnold v. Morris*, 7 Daly, 498, 505; *Snelling v. Howard*, 51 N. Y. 373.)

EARL, J. This action was brought by the plaintiffs to recover the sum of \$6,966.86, alleged to be due from the defendants for the use of the steamship *Francis Wright*, under a charter-party dated September 13, 1872. The complaint alleges that the steamship was chartered by the defendants for the purpose of going to Galveston, Texas, and bringing thence a cargo of fresh beef. The defendants, in their answer, besides denying most of the material allegations of the complaint, alleged that the steamship was chartered by a written charter-party to the firm of Duncan & Poey; that the plaintiffs wholly failed to keep and perform the charter on their part, and failed to keep the vessel tight, staunch, well-fitted, tackled and provided with every requisite for such a voyage, as in and by the charter they agreed to whereby great damage resulted to the charterers to an amount exceeding the charter money; and for a further defense they alleged as follows: "That the following persons and no others were interested in the said adventure, viz.: Stephen Flanagan, James M. Flanagan, Edward W. Wilson, R. Ross Roberts, J. Kemp Bartlett, James F. Matthews, Jacob M. Duncan and Simon Poey; and that the said R. Ross Roberts, who resides at Harrisburg, Pennsylvania, J. Kemp Bartlett, who resides at Easton, in the State of Maryland, and James F. Matthews, who resides in New York city, all three of whom are still living, are necessary parties defendant in this action." The action was brought to trial at a Circuit Court, and the judge presiding directed a verdict in favor of the

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plaintiffs, and the judgment entered thereon was affirmed at the General Term.

It appeared upon the trial that the charter-party was signed only by the plaintiffs under the firm name of Woodhouse & Rudd, and by the defendants, Duncan & Poey, under the firm name of Duncan & Poey. The claim is therefore made that the action cannot be maintained upon the charter-party against all of the defendants. But it appeared at the trial conclusively that Duncan & Poey executed the charter-party, in their own names, on behalf of all the defendants; and as the charter-party was not under seal, it was competent for the plaintiffs to show that it was executed by Duncan & Poey, not only for themselves, but as representing all those who chartered the steamship. They may, therefore, be treated as agents executing the charter-party for themselves and all others interested as principals with them. (*Briggs v. Partridge*, 64 N. Y., '357; *Hill v. Miller*, 76 id., 32; *Nicoll v. Burke*, 78 id., 580.)

The charter-party contained this stipulation: "The said party of the first part agree that the said vessel in and during the said voyage shall be kept tight, staunch, well-fitted, tackled and provided with every requisite for such a voyage." It appeared that the vessel went to Galveston and there took on a cargo of fresh beef and started upon her return voyage, and that before reaching her destination the beef spoiled and was thrown overboard and was thus wholly lost. The defendants claimed that the loss was occasioned by reason of the defective condition of the boiler and machinery of the vessel in consequence of which she was greatly delayed in making her voyage. Soon after her return Duncan & Poey commenced a suit in admiralty against the steamship and her owners to recover damages for the alleged breach of the charter-party in failing to keep the vessel well-fitted and provided with every requisite for the voyage, claiming, that in consequence thereof, the beef was lost and that they sustained great damage. That suit passed through the Federal courts to the Supreme Court of the United States, and the opinion

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pronounced therein in the latter court is reported in 105 United States Reports, 381. The libel in that suit was dismissed on the ground that the defendants in that suit, the owners of the vessel, "had kept and performed all the covenants and undertakings in the said charter-party contained on their part, and that the said vessel, in and during said voyage, was kept tight, staunch, well-fitted and tackled, and provided with every requisite for the voyage." One of the conclusions of law found in the record of that court is as follows: "That libellant having failed to prove that the damage to the cargo of fresh beef on said steamer was the direct and natural result of any breach of the covenant of seaworthiness in said charter-party, are not entitled to recover such damages in this action." The judgment recovered in that suit was received in evidence upon the trial of this action, and it was held by the trial judge that it conclusively established that the plaintiffs had fully performed the charter-party on their part, and that the defendants were not entitled to any damages for any alleged breach of covenants therein contained, and that the plaintiffs were entitled to recover the balance of the charter money due. In these holdings, upon the plainest principles, there was no error. The adjudication in that suit was binding upon the parties thereto, and upon those whom they represented and who were in privity with them. Duncan & Poey, who were the libellants and plaintiffs in that suit, represented the charterers and prosecuted the suit, not only for themselves but for all their associates. Hence, while their associates were not actually parties to the suit, they would have reaped the benefit of a favorable result, and were bound by the judgment rendered therein. They had a right to be heard in the suit, and were heard through Duncan & Poey, and were in privity with them. It was just as much their suit as the suit of Duncan & Poey, and the precise points at issue in that suit and adjudicated therein could not again be brought in question between these plaintiffs and the charterers of the vessel. (*Embury v. Conner*, 3 N. Y., 511; *Castle v. Noyes*, 14 id., 329; *Tuska v. O'Brien*, 68 id., 446;

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Dunbar v. Bower, 77 id., 76; *Church v. Kidd*, 88 id., 652; *Leavitt v. Wolcott*, 95 id., 212.) There was, therefore, no error in holding that the adjudication in the admiralty suit bound these defendants and conclusively established the performance of the charter-party on the part of these plaintiffs. Hence there was nothing left for litigation between the parties upon the merits of the case.

But the point is made that the plaintiffs ought to have been defeated because they did not include in the action, as parties defendant, R. Ross Roberts, J. Kemp Bartlett and James F. Matthews, whose names are mentioned in the answer of the defendants. This is an extremely technical defense, and, so far as we can perceive, of no real consequence to any one. If successful, it would simply result, after a long litigation between these parties, through all the Federal courts and through the courts of this State to its highest tribunal, in a reversal of this judgment and the bringing in of the three persons named as defendants, and then a judgment against all the defendants would be inevitable. A defense thus technical should be closely scrutinized and should not be permitted to prevail if upon any permissible view of the case it can be avoided. It was proved, upon the trial, that all the persons named in the answer were interested in the adventure of bringing beef from Galveston to Philadelphia. Stephen and James M. Flanagan were interested to the extent of one-fifth; Wilson, one-fifth; Duncan and Poey one-fifth; Roberts one-fifth, and Bartlett and Matthews together one-fifth. If the plaintiffs had known, at the time they entered into the charter-party, that these several persons were interested as claimed, it would have been their duty to make them all defendants in the action; and in that event the contract would really have been made with them all. But if at the time of making the contract the three persons referred to were not known to the plaintiffs to be joint contractors with the defendants, and they supposed that they were contracting with the defendants only, then the three persons named could be treated as dormant partners, and it was not necessary to make

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them parties defendant. (*Brown v. Birdsall*, 29 Barb., 549; *Farwell v. Davis*, 66 id., 73; *Arnold v. Morris*, 7 Daly, 498; *North v. Bloss*, 30 N. Y., 374; *Leslie v. Wiley*, 47 id., 648; *Marvin v. Wilber*, 52 id., 270; *Cookingham v. Lasher*, 1 Abb. Ct. App. Dec., 438; *Bonfield v. Smith*, 12 M. & W., 405; *De Mautort v. Saunders*, 1 B. & Ad., 398, 401; Collyer on Partnership, § 719.) It is not sufficient that the plaintiffs may have known that the three persons named had some sort of interest in the adventure, but they must have known that they were members of a firm with the defendants, or that they were joint contractors with them; and this there was no sufficient evidence in the case to show.

The answer is insufficient. It simply shows that the three persons named were interested in the adventure. There is no allegation that they were partners, nor is there any allegation that they were joint contractors with the defendants named, or that the plaintiffs made any contract whatever with them. The proof simply shows that at the time of the making of the charter-party the plaintiffs knew that they were contracting with these defendants, and had information that some other persons had some slight interest in the adventure. But they had no knowledge that such other persons were interested as partners, or that they were parties to the contract which they were then making. They may have supposed, as their names were not mentioned, and had a right to suppose, that they had some remote or contingent interest in the profits or proceeds of the adventure, while they were not, in any proper sense, parties to the contract. Upon this point the case recently decided by us of *Swift v. Pacific Mail Steamship Company*, and *Panama Railroad Company*,* is an authority. This may be regarded as a somewhat narrow view of the evidence given upon the trial, but we think it is admissible for the purpose of defeating what appears to us to be an extremely technical objection.

Some other points were discussed upon the argument before

* *Ante* page 206.

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us, but they are not deemed to be of sufficient importance to require particular attention here. They have received sufficient consideration, and we think point out no error.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE NATIONAL FILTERING OIL COMPANY, Respondent,
v. THE CITIZENS' INSURANCE COMPANY OF MISSOURI,
Appellant.

106	535
126	14
106	536
132	56

A policy of insurance, executed by defendant to plaintiff, recited that E. & Co., "by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month." It was covenanted in and by the policy that, in case the premises occupied by E. & Co. should be damaged by fire, "so as to cause a diminution of said royalties," defendant would pay "the amount of such diminution, during the restoration of said premises to their producing capacity, immediately preceding said fire." *Held*, that the insurance was not limited to the guaranteed minimum, but covered all the royalties, payable by E. & Co. under their contract; that, as so construed, the policy was not void as a wager policy; that while, beyond the amount guaranteed, the royalties were contingent, as E. & Co. could limit their production so that it yield no royalties beyond that amount, yet, as it appeared that their license from plaintiff was an exclusive one, and as, therefore, if their business was lessened or restricted because of a fire, plaintiff could not license others, but must bear the loss of the diminished royalties, against that risk, which was necessarily connected with the premises, it was lawful to insure.

An interest, legal or equitable, in property, is not necessary to support an insurance upon it; it is sufficient if the assured is so situated as to be liable to loss if the property be destroyed by the peril insured against. Also *held*, that it was competent to give in evidence the contract between plaintiff and E. & Co.

Also, *held*, that the recovery could not be limited to loss of royalties on the oil actually burned, as the principal loss arose from the enforced idleness of the works; and that it was competent on the question of

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damages to prove the royalties paid for two months immediately preceding the fire, and those paid during the restoration of the works, and for some months thereafter.

(Argued June 14, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 16, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The action was upon a policy of fire insurance, the substance of which and the material facts are stated in the opinion.

G. A. Clement for appellant. The written agreement between Ellis & Co., and the plaintiff and the policy should not be considered together as one instrument. The defendant is not bound by the terms of a written contract which it had never seen, and to which it was not a party. (Wood on Ins. § 41; May on Ins. §§ 3, 31; *In re Com'rs*, 52 N. Y. 131; *Wilson v. Randall*, 67 id. 338, 341; *Knowles v. Loone*, 96 id. 534, 536; *King v. Leighton*, 100 id. 386, 391; *Chadsey v. Guion*, 97 id. 339; *Holmes v. Hubbard*, 60 id. 183, 185, 186; *Clarke v. Dillon*, 97 id., 373.) An insurable interest must not only exist when a policy of insurance is issued, but its existence is equally necessary at the time of the fire. (*Fowler v. N. Y. Ind. Co.*, 26 N. Y. 422; reversing 23 Barb. 143; *Williams v. Ins. Co. N. A.*, 9 How. 365; *Freeman v. Fulton Ins. Co.*, 38 Barb. 247; *Tallman v. Atl. Ins. Co.*, 29 How. 71, 86; *Quarrier v. Peab. Ins. Co.*, 10 W. Va. 507; *Royal Ins. Co. v. Horton*, 14 Ins. L. J. 871; Wood on Ins. § 251; *Rohrbach v. Germ. Ins. Co.*, 62 N. Y. 47, 54; *Harvey v. Cherry*, 76 id. 440.) The extent of plaintiff's legal insurable interest was governed or limited by the amount of oil destroyed. (May on Ins. § 2; Wood on Ins. §§ 248, 258, 259; 1 Phillips on Ins. § 183; Marshall on Ins. 106; Arnold on Ins. 247; *Warren v. Davenport Ins. Co.*, 31 Ia. 465, 468; *Stockdale v. Dunlop*, 6 M. & W. 224; *Com. Ins. Co. v. Cap. City Ins. Co.*, 16 Ins. L. J. 81; *Abbott v. Sebor*, 3 Johns. Cas.

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39, 44, 97, 104.) To sustain an insurable interest, there should be some direct pecuniary interest in the building, or other subject-matter of the insurance which may be damaged or lost by the fire. (*Mut. L. Ins. Co. v. Wagner*, 15 Ins. L. J. 704.) The court below erred in adopting the mode of computation and comparison and guess-work proposed by the plaintiff, extending over a period of six months, as it must have necessarily included elements of danger or loss in part, at least, caused by the uncertain and irregular demands of trade, and what would have been the necessary consequences of a stoppage of the works from other causes, than by the fire. (*Searles v. Man. R. R. Co.*, 101 N. Y. 661; 2 Cent. Rep. 442.) The arbitrary finding of amount and the decision of the General Term in regard thereto are opposed to settled legal principles. (*Ins. Co. v. Boone*, 95 U. S. 117, 130, 133; *Leutze v. Chateau*, 42 Penn. 435; *Masterson v. Mt. Vernon*, 58 N. Y. 396; *Cassidy v. Le Fevre*, 45 id. 562.)

F. R. Coudert and *Paul Fuller* for respondent. Plaintiff's right to royalties gave it an insurable interest in the premises of Ellis & Co. (2 R. S. [6th ed.] 653; *Gillett v. Bate*, 86 N. Y. 92; *S. F. & M. Ins. Co. v. Allen*, 43 id. 389, 395, 396; *Rohrback v. Germ. Ins. Co.*, 62 id. 57; *Lucena v. Crawford*, 1 B. & P. N. R. 269; Arnould on Ins. 229.) There is no ground in law, or in the facts for the appellant's contention that the policy in question was a mere wager policy. (*Valton v. Nat. L. & F. L. Ass. Soc.*, 22 Barb. 35; 20 N. Y. 36; *Goodwin v. Mass. Mut. L. Ins. Co.*, 73 id. 496; *Abbott v. Sebor*, 3 Johns. Cas. 44; *Miller v. Eagle L. & Health Ins. Co.*, 2 E. D. S. 290; *S. C.*, 3 id. 291; 1 R. S. 662; 1 Phillips on Ins. 6 [3d ed.] chap. 1, § 2, subd. 7.) The appellant having made the contract of insurance, issued its policy thereon, and received the stipulated premiums as fixed by itself for two successive years, or terms, is estopped thereby from now questioning the validity of the contract. (2 Par. on Cont. 793, chap. 4, § 4; *Isham v. Buckinham*, 49 N. Y. 222, 223.) The contention of the appellant that by a proper construction of

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the policy, the subject-matter of the insurance was, in any event, only the guaranteed royalties, of \$250 per month, and that, consequently, the appellant only insured or guaranteed the pecuniary responsibility of Ellis & Co. to that amount, is untenable. (2 R. S. [6th ed.] 653; *Harper v. A. Mut. Ins. Co.*, 17 N. Y. 198; 1 Duer on Ins. 161; *Rolker v. Gt. West. Ins. Co.*, 4 Abb. Dec. Ct. App. 76, 82; *Herrman v. Merch. Ins. Co.*, 81 N. Y. 184, 187, 188; *Dilleber v. Home L. Ins. Co.*, id. 263.)

FINCH, J. The insurance which forms the subject of this litigation was of an unusual character, and presents a question for the solution of which we have no admitted precedent. It was an insurance upon the oil reducing and filtering works of Ellis & Co., and for the protection of specified royalties, payable by that firm to the plaintiff as compensation for an exclusive license to use in their business a certain patent which belonged to and was controlled by the plaintiff company. The policy, by its terms, insured that company "on royalties payable to insured from the business of John Ellis & Co., carried on in premises situate in Brooklyn, on block bounded by Sullivan, Walcott and Ferris streets and Buttermilk channel," and then proceeded with a more specific statement, thus: "Whereas, the above-named firm of John Ellis & Co., by virtue of an agreement with the assured are bound to pay to them royalties for the privilege of using their patent, which royalties are guaranteed to amount to \$250 a month; now, therefore, the conditions of this insurance are that, in case the premises occupied as above by said Ellis & Co. shall be damaged by fire so as to cause a diminution of said royalties, this company will make good to the insured the amount of such diminution during the restoration of said premises to their producing capacity immediately preceding said fire. In case of the destruction by fire of said premises, then this company shall pay the full amount insured." That full amount was \$1,000. Upon the trial the contract with Ellis & Co., referred to in the policy, was read in evidence, under an objection taken by the defendant, and was later

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withdrawn from the case, the defendant again objecting; but all controversy upon the subject seems to have been terminated by a stipulation of the parties, which permitted the original contract to be used on any appeal with the same force and effect as if printed in the case. It was so used in the General Term, and the appellant's brief treats it as in the case, but insists upon the objection taken to its admissibility. That objection is not well founded. The royalties insured were the product of the contract. They sprang out of that and were measured by it and depended upon it. The parties recognized and acted upon the fact. The policy in terms refers to the contract as the origin and measure of the royalties and recites the stipulations deemed most immediately material. We cannot perfectly understand the risk assumed and the subject insured except by the very reference which the policy made to the contract which created the risk and disclosed and described the royalties. It was properly put in evidence, and we must assume that the recital in the policy and the statement in the opinion of the General Term fairly cover and express its conditions.

We are first to ascertain what loss was insured against. The defendant company contends that the risk it assumed extended no further than diminution of royalties below the guaranteed minimum, and, since there never was such diminution, that the judgment rendered was erroneous. But such is not the proper construction of the policy. That insured the royalties payable under the contract; not merely the guaranteed proportion, but the royalties stipulated; that is, the whole of them. Up to the minimum amount they depended upon the financial responsibility of Ellis & Co., for to that extent they were payable in any event, and the risk was on the licensees. But beyond that they depended upon the running capacity of the works, and the amount of oil they could put upon the market, and which could be sold. The phrase "said royalties" in the policy refers to the royalties payable by force of the agreement, and to the whole of them, and is not restricted or narrowed by the descriptive statement that

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they — that is the royalties insured — were guaranteed to be not less than \$250 a month. Whatever they should prove to be they were insured against a diminution caused by fire at the works, and not merely a minimum proportion or guaranteed part of them.

But these royalties, it is argued, were not capable of supporting an insurance, and the policy was a wager policy. It is quite true that, beyond the guaranteed minimum, they were contingent and dependent upon the condition of the market, and even, possibly, upon the will or choice of Ellis & Co., in the reasonable control of their business. That firm was not bound to pay except upon oil manufactured and sold, and might limit both, or be compelled by the market to limit both to a production yielding no royalties beyond the guaranteed minimum; and so, it is said, the plaintiff had no fixed or definite right to royalties beyond such minimum, no assurance of their existence, no power to compel or demand their being, and could not be said to have lost what it neither had, nor the absolute right to possess. But a further fact in the case establishes more definitely the plaintiff's risk and loss, and the direct causative connection between that loss and the fire which injured the works. The license held by Ellis & Co. to use the plaintiff's patent, was an exclusive one, and the earning power of that patent was thus narrowed to the business of Ellis & Co. If the latter did not continue their business, and so preserve the fruitfulness of the patent, by reason of some fault of their own, or from a cause for which they were responsible, the exclusive character of the license ended, and the patentees were at liberty to transfer the right to others, and thus secure the profits of their invention. But if the business of Ellis & Co. was lessened or restricted because of a fire which should destroy or impair their works, the exclusive right given them was to continue; the patentees could not license others, and must necessarily bear the loss of their diminished royalties. This was the one business risk involved in their contract. Against all others they could provide, but this one they were compelled to bear by the terms

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of their agreement. Against that risk they insured. It had a direct and necessary connection with the safety of the structures burned. A fire destroying them destroyed the royalties *pro tanto*, because the efficient cause of their loss, and so was established the needed connection between the premises insured and the royalties dependent upon their safety and measuring the loss resulting from their destruction. The policy was, therefore, not a mere wager, and the royalties could be protected by an insurance against the fire risk which threatened them.

The authorities in this State go far enough in their general principles to cover the case in hand. (*Herkimer v. Rice*, 27 N. Y. 163; *Springfield F. & M. Ins. Co. v. Allen*, 43 id. 389; *Rohrbach v. Germania Fire Ins. Co.*, 62 id. 47.) They decide that an interest, legal or equitable, in the property burned, is not necessary to support an insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against; that such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss from its destruction, is an insurable interest; that if there be a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. The plaintiff brought its case within these principles. A loss measured by the diminution of its royalties, was the inevitable result to it of a fire in the works of Ellis & Co. It could not substitute a new license and must await the repairs necessary to a renewal of the business. By its contract it became so situated relative to the buildings insured, that it had a direct pecuniary interest in their safety from accidental fire. That interest it could, as it did, insure.

We are further of opinion that no error was committed in the mode of ascertaining and measuring the loss. The amount of royalties paid for two months immediately pre-

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ceding the fire was proved, also the amount during the time the works were being restored, and for some months thereafter. It was not confined to royalties upon the amount of oil actually burned. That could have been promptly replaced by Ellis & Co., with perhaps little delay and very moderate diminution of their volume of business. The bulk of the injury came from the enforced idleness of the works, against which, under their contract, the plaintiff company had no remedy. The amount of loss was established in the only manner possible, and upon sufficient facts for the formation by the jury of a reasonable conclusion. They were not left to a bare guess or speculation.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HORACE N. SHERMAN, Respondent, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

In an action to recover damages for alleged negligence, it appeared that plaintiff was a passenger in a train on defendant's road, and as the train approached his destination he arose from his seat and went to the end of the car to get some baggage. On his return he tripped and fell over a board which a brakeman had placed across the aisle from one seat to the one opposite and was injured. The brakeman was called as a witness for the defendant and testified that he was standing, or about to get up, on the board when plaintiff came up and asked to be permitted to pass; the witness, in doing this, cautioned him to be careful about or look out for the board. On cross-examination said witness was asked if he did not state to plaintiff, on the train, that he had forgotten to remove or slide back the board and that it was his fault, that he was careless. This was objected to; objection overruled and witness answered, denying any such conversation, and he denied having any conversation with plaintiff after the accident. Plaintiff was subsequently recalled, and, after testifying that he did have a conversation with the brakeman, was asked to state it. This was objected to; objection overruled and exception taken. Plaintiff in giving the conversation did not testify that the brakeman stated it was his fault, but on being directed by the court to repeat the conversation included that statement. *Held*, that the reception of the evidence was error; that it

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did not legitimately tend to impeach or contradict the direct testimony of the brakeman; also, the fact that the declaration was called out by the court, not in response to the question of plaintiff's counsel, and that no motion was made to strike it out did not deprive defendant of the benefit of the exception; that as the court had already ruled that the conversation was proper it was not necessary to repeat the objection.

(Argued June 14, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 16, 1884, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Hamilton Odell for appellant. As there was no proof of any "higher contrivance" for use in lighting lamps the plain intimation of the charge, that if any existed the defendant was bound to use it, and was guilty of negligence in not using it, was error. (*Steinweg v. Erie R. Co.*, 43 N. Y. 128.) It is error to submit a question to a jury where there is no evidence to authorize any finding thereon. (*Alger v. Gardner*, 54 N. Y. 364; *Palmer v. Kelly*, 56 id. 637; *Storey v. Brennan*, 15 id. 526, 528; *Rouse v. Lewis*, 2 Keyes, 359.) It was error to allow the plaintiff to relate his conversation, had after the accident, with Blaser, the defendant's brakeman, in which the brakeman said: "It is my fault, the board being left there." The brakeman's declaration was not competent evidence against the company. (*Lube v. H. R. R. Co.*, 17 N. Y. 131; *Whitaker v. Eight Ave. Co.*, 51 id. 295; *Shaver v. N. Y. & L. C. Co.*, 31 Hun, 55; *Pfeffell v. Second Ave. Co.*, 19 Week. Dig. 44; *Ryan v. Gilmer*, 2 Mont. 517; *Adams v. H. & St. J. R. R. Co.*, 74 Mo. 553; *Anderson v. R. W. & O. Co.*, 54 N. Y. 341; *Homer v. Everett*, 91 id. 645; *Baptist Church v. Brooklyn Ins. Co.*, 28 id. 160; *Darling v. Oswego F. Co.*, 30 Hun, 276.) A party who cross-examines a

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witness as to an immaterial or a collateral matter is concluded by his answers. (*Carpenter v. Ward*, 30 N. Y. 243.) The court erred in permitting Dr. Sanders, to relate statements made to him by the plaintiff explaining how he received his injury. (*Wadele v. N. Y. C. R. R. Co.*, 95 N. Y. 274; *Page v. N. Y. C. R. R. Co.*, 6 Duer, 531, 532; *Gardner v. Bennett*, 6 J. & S. 201; *Roosa v. Boston L. Co.*, 132 Mass. 439; *Chapin v. Marlborough*, 9 Gray, 244.)

L. B. Treadwell for respondent. There was no error in allowing plaintiff to testify to the declarations of the brakeman as to the cause of the accident. Such declarations were competent and material as a part of the *res gestæ*. (*Hagenlocher v. C. I. R. R. Co.*, 99 N. Y. 136; *Sloan v. N. Y. C. R. R. Co.*, 45 id. 125; *McGraw v. Latham*, 84 id. 677; *Sitterlee v. Gregg*, 90 id. 686; *Homer v. Everett*, 91 id. 641; *Powers v. W. Troy*, 25 Hun, 561; *Casey v. N. Y. C. & H. R. R. Co.* 78 N. Y. 518; Wharton on Ev. §§ 262, 263; *R. R. Co. v. Messino*, 1 Sneed [Tenn.] 220; *Gerks v. California Steam Nav. Co.*, 9 Cal. 251; *Hanover R. R. Co. v. Coyle*, 57 Penn. St. 402; *Elkins v. McKean*, 79 id. 493; *Brownell v. Pacific R. R. Co.*, 47 Mo. 240; *Harriman v. Stowe*, 57 id. 93; *Entwistle v. Feighner*, 60 id. 214; *Gildersleeve v. Landon*, 73 N. Y. 609; *Merritt v. Lyon*, 3 Barb. 110; *Nicolay v. Unger*, 80 N. Y. 54; *Greenfield v. People*, 13 Hun, 242; *Root v. Brown*, 4 id. 797; *Patchin v. Astor M. I. Co.*, 13 N. Y. 639; *Schell v. Plumb*, 55 id. 592; *Gilbert v. Sage*, 5 Lans. 287; 57 N. Y. 639; *Third Ave. R. R. Co. v. Ebling*, 100 id. 98.) It was for the jury to say whether, under the circumstances, it was prudent to place the board across the aisle just as the train was entering the station, and whether there was negligence on the part of the brakeman in leaving it there. (*McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417; *Hays v. Miller*, 70 id. 112; *Weed v. Ballston Spa*, 76 id. 359; *Hart v. H. R. B. Co.*, 80 id. 622; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 id. 332; *Barry v. N. Y. C. &*

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H. R. R. R. Co., 92 id. 289; *Dina v. N. Y. C. & H. R. R. R. Co.*, id. 639; *Wadele v. N. Y. C. & H. R. R. R. Co.*, 19 Hun, 69; *Watkins v. Atl. Ave. R. R. Co.*, 20 id. 237; *Hawley v. N. Cent. R. R. Co.*, 82 N. Y. 370.) The charge of the judge that it was for the jury to consider whether this board was the highest contrivance to use for the purpose for which it was used, was previously qualified by his charging that he did not think it was negligent to place the board across the aisle. (*Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Hegeman v. W. R. R. Co.*, 13 id. 9; 2 Redf. on Rys. [3d ed.] 189; *Smith v. N. Y. & H. R. R.*, 19 N. Y. 127; *Salters v. D. & H. C. Co.* 3 Hun, 339.)

PECKHAM, J. The plaintiff brought this action to recover damages alleged to have been sustained by him through the negligence of defendant's servants. He was a passenger on one of the defendant's trains and was going, in September, 1882, from Hoboken to Murray Hill station. He took the train at 5.20, and was approaching his destination about 6.40. The plaintiff says he heard a whistle which he supposed was meant for his station and got up from the seat in which he was sitting and walked to the other end of the car to get some of his baggage, which, having done, he was returning to his former seat, when, in passing along the aisle, he tripped and fell over a board stretching across it from under one seat to the one immediately opposite, which board had been placed there by a brakeman in order to reach and light one of the lamps in the car. The plaintiff says that he was badly hurt, and he claims to recover his damages from the company, based upon the alleged negligence of the brakeman in leaving the board there while he went to the end of the car to attend to some duty consequent upon the approach of the train to the station. It was getting rather dark in the car at the time of the accident, and the board was raised from the floor about fifteen inches, and the plaintiff, while proceeding, as he says, with ordinary care, failed to see the board, which was so securely fastened in its place as not to yield, and it thus

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caused the accident. There was a dispute as to the time when the board was placed there by the brakeman; the plaintiff alleging it was between the time he passed down the aisle for his baggage and his return to his seat, while the brakeman alleged that he was standing, or just preparing to stand, on the board when the plaintiff came up and asked him to let him pass, which he did, and in doing so cautioned him to be careful about or to look out for the board. After the brakeman had given this testimony on his direct-examination, the plaintiff's counsel asked him what conversation he had with the plaintiff on that day while on the train to Murray Hill station. This was objected to by defendant's counsel as incompetent and immaterial, which, being overruled, he excepted, and the witness answered that he had none — not a word. He was again asked if he did not state to the plaintiff that he had forgotten to move or slide back to its place the board on which he had stood, and that it was his fault, that he was careless. This was also objected to, the objection overruled, and the defendant's counsel excepted. The witness then answered and denied that he had stated any such thing. The plaintiff was subsequently recalled and asked by his counsel if he had any conversation with the brakeman in relation to the accident on the day it occurred, and he answered that he had, and under objection and exception by defendant's counsel he stated the brakeman asked him if he was much hurt, and he answered that he was badly hurt and suffering great pain. The court then asked him to repeat the conversation, which he did, and added what he had not stated in answer to his counsel, that the brakeman said, "it is my fault the board being left there."

It is perfectly evident that the conversation about which the brakeman was interrogated on his cross-examination was a conversation after the accident had happened and was aimed at drawing out a statement from the witness as to how the accident had occurred or what caused it, and whose fault it was. That evidence was plainly inadmissible against the defendant. It was no part of the *res gestæ*, but was calling simply for a

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narrative of the cause of a past occurrence. The authorities are numerous and it is not necessary to cite them. The evidence being in its nature inadmissible, the plaintiff could not obtain the benefit of it by cross-examining the brakeman in regard to it, and, upon his denying it, seek to prove it by another witness under the guise of contradicting the brakeman. The objection to the question was well taken when the plaintiff asked it on cross-examination, but the question being admitted under defendant's objection, and the witness denying that he ever said it, the plaintiff was bound by his answer and had no right to contradict him by other evidence. There was nothing in the evidence of the alleged conversation sworn to by the plaintiff, which legitimately tended to impeach or contradict the evidence given by the brakeman on his direct examination, which was proper as detailing a part of the occurrence.

It is urged, however, that the addition made by the plaintiff in his answer to the court, by stating that the brakeman said it was his fault, did not come in under defendant's objection, and that no motion to strike it out being made there is no valid exception. This is not tenable. The evidence of the conversation, whatever it was, was duly objected to, and the court simply required the witness to repeat it. It was quite unnecessary to again repeat the objection. The court had already ruled that the conversation was proper, and when the witness, in again answering, made an additional statement, it came in under the objection and exception already taken.

It is also said that the evidence in the case is so plain as to the happening and the cause of the accident, that the testimony under consideration could not have possibly harmed the defendant. This we cannot clearly see. The case may have been fully proved, and yet the responsibility of defendant therefor not necessarily follow. This evidence was an admission of the brakeman that it was his fault that the board was left there, and we cannot say that the jury did not take such statement as an admission of its negligence by the company.

A verdict for the plaintiff having been rendered, and there being in the case evidence which was incompetent, and

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which we cannot say may not have influenced (and which probably did influence) the jury, we have no alternative, but must reverse the judgment and grant a new trial, with costs to abide the event.

All concur.

Judgment reversed.

DANIEL C. CASE, Respondent, v. WEALTHY DEXTER et al.,
Appellants.

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A deed described the premises conveyed as "known by being lot No. 3 * * * lying southerly or south-easterly of Fish Lake * * * commonly called the Fish Lake lot, supposed to contain sixty-seven acres of land." Lot 3 contains about six hundred acres, all of which, except about sixty-seven acres lying south of the lake and about seven acres north of it, are covered by the lake. In an action of trespass, wherein the *locus in quo* was the seven acres, to which defendant claimed title under the deed, *held*, that the deed did not cover the seven acres; that the reference to the land intended to be conveyed as "lot 3" was a mistaken or false.

Plaintiff offered to prove that the land south of the lake was known by common repute as the "Fish Lake lot." This was objected to and rejected. *Held*, that if there was any doubt on the proof, as it stood, as to the intention of the parties the rejection of this evidence was error. Rules as to construing descriptive words in a deed where the particulars are inconsistent, stated.

(Argued June 15, 1887; decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made January 13, 1885, which reversed a judgment in favor of defendants entered upon a verdict.

This was an action of trespass. The material facts are stated in the opinion.

S. N. Dada for appellants. Actual occupancy of a part of a lot under a paper title covering the whole lot, makes constructive possession of the remainder of the lot. (*Edwards v.*

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Noyes, 65 N. Y. 125; *Bliss v. Johnson*, 94 id. 242; *Thompson v. Burhans*, 79 id. 97, 99; *Doe v. Thompson*, 5 Cow. 371; *Hammond v. Zehner*, 23 Barb. 473; Bigelow on Torts, 167; Code of Civ. Pro. § 369; 3 R. S. [7th ed.] 2205, § 2; *Coleman v. Beach*, 97 N. Y. 547; *Bennett v. Culver*, id. 250; *Rosebloom v. Rosebloom*, 51 id. 356, 359; *Freeman v. Coit*, 96 id. 63, 68; *Byrnes v. Stillwell*, 103 id. 453, 460; *Thornhill v. Hall*, 2 Cl. & Fin. 22.) In a description that which is certain controls what is uncertain. (Gould on Waters, 343; *Masten v. Olcott*, 101 N. Y. 152; *Beardsley v. Hotchkiss*, 96 id. 212; *Connolly v. Vernon*, 5 East, 51; *Church v. Kemble*, 5 Sim. 525; *Parkin v. Parkin*, 5 Taunt. 321; *Ryall v. Bell*, 8 T. R. 579; *Holmes v. Hubbard*, 60 N. Y. 183.) When a deed contains an express reference to another instrument or writing clearly identified, and intended to be resorted to for completeness of description or understanding, it will be taken as an integral part of the deed, and be construed with it. (8 Shepl. 69; 6 Pick. 460; 1 N. & McC. 381; 20 Pick. 121; Gould on Waters, § 194; 3 Sumn. 170; 3 Kerr, 242; 1 Shepl. 329; McCall on R. Prop. § 65; 4 Cruise's Dig. 326; Moor, 679; 8 T. R. 483; Stark. R. 130, 162; 14 East, 598; 5 Pick. 181; 3 Bebb. 10; 93 N. Y. 507.) Defendants' conclusion as to the intent expressed in the description in defendants' title deeds is sustained by the subsequent acts and conduct of the parties to the deeds. (*Reading v. Gray*, 37 Super. Ct. 79; Add. on Con., 182, n.; *L. V. & N. Co. v. Harlow*, 3 Casey, 439; *Hathaway v. Power*, 6 Hill, 453; 4 Cruise's R. E., 344, § 60.) A conveyance by name and number is as good as by metes and bounds. (*Stanley v. Green*, 12 Cal. 148; *Foss v. Crisp*, 20 Pick. 121; *Bower v. Earl*, 18 Mich. 367.) Statements of quantity do not govern. Title passes to all land embraced in the formal description. (*Mann v. Pierson*, 2 John. 471; *Jackson v. McConnell*, 19 Wend. 175; McCall on R. Prop. § 61; *Palmer v. Dodd*, 8 West. R. 797; *Powell v. Clark*, 5 Mass. 355.) The plaintiff failed to make out adverse possession by himself of that part of lot 3 on the north side of the lake. (2 R. S. 94; Code of Civ. Pro., §

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370; *Paige v. Warring*, 25 W. D. 36; Gerard on Tit. 641.) The interpretation as well as the construction of a written instrument is for the court and not for the jury. (1 Greenl. Ev., § 277 and n. 2; *Groat v. Gile*, 51 N. Y. 431; *St. Luke's Home v. Ass'n.*, 52 id. 191; *Glacius v. Black*, 67 id. 563; *A. F. I. Co. v. Austin*, 69 id. 370; *Miller v. Dunlap*, 5 West. R. 91 [Mo.]; *Coding v. Wood*, 2 Cent. R. 838 [Pa.]; *Shoemaker v. Chappell*, id. 556.) It was proper, within the rule of *res gestæ*, to show that Onderkirk, defendant's grantor, while occupying lot 3, under a paper title, claimed to own Peperidge Point, and to show the character and intention of his possession. (*Abeel v. Van Gelder*, 36 N. Y. 513; *Botsford v. Darling*, 44 id. 666; *Smith v. McNamara*, 4 Lans. 169; Abb. Trial Ev. 154, subds. 1, 2, 3, 4, p. 711.) The legal effect of a conveyance is determined by the terms employed, and cannot be controlled by parol testimony, unless there is a latent ambiguity, or the description is rejected as false, or the identical boundary, referred to in the conveyance, is in dispute. (Gould on Waters, 344, § 195) The words "part of" cannot be inserted before the words "Lot No. 3" in order to furnish a different antecedent to which the clause "lying southerly or south-easterly," etc., might refer and thus give effect to such clause. (*Holcomb v. Munn*, 5 Cent. R. 402; *Drake v. Seaman*, 94 N. Y. 230; 54 id. 253; 61 id. 591; 87 id. 69; Add. on Cont. 165; *Shore v. Wilson*, 9 C. & F. 565.)

Giles S. Piper for respondent. The deeds under which the defendant, Wealthy Dexter, claims title do not, as a matter of law, convey that portion of lot No. 3, lying on the north side of the lake, and the plaintiff was entitled to a verdict under the evidence. (*Van Wyck v. Wright*, 18 Wend. 157; *Baldwin v. Brown*, 16 N. Y. 361; *Brookman v. Kurzman*, 94 id. 272; *Ousby v. Jones*, 73 id. 621.) The words "commonly called the Fish Lake lot," were controlling, descriptive words. (*Masten v. Olcott*, 101 N. Y. 158; 3 Wash. on Real Estate [4th ed.], 402.) The enclosure of the premises was

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sufficient to create title by adverse possession. (*Becker v. Van Valkenburgh*, 29 Barb. 319; *Jackson v. Halstead*, 5 Cow. 220, 221; *Crary v. Goodman*, 22 N. Y. 170, 175; *Thurman v. Cameron*, 24 Wend. 87; *Sands v. Hughes*, 53 N. Y. 287; *Christie v. Gage*, 71 id. 189; *Dawley v. Brown*, 79 id. 390; *Argotsinger v. Vines*, 82 id. 308.) The plaintiff was entitled to have had the case submitted to the jury upon the whole case as it stood. (*Trustees v. Kirk*, 84 N. Y. 215; *First Nat. Bk. v. Dana*, 79 id. 108; *Stone v. Fowler*, 47 id. 566; *Clemence v. Auburn*, 66 id. 334.)

ANDREWS, J. The case, as presented, raises the single question whether the defendant, Wealthy Dexter, in February, 1882, when the alleged trespass was committed, was the owner of the *locus in quo*, a parcel of land containing about seven acres, lying on the northerly side of Fish Lake, in the town of Granby, Oswego county, being part of lot 3 of the original township of Lysander. Her title to the premises, if any, is derived through intermediate conveyances from one John L. Norton and others, who, on the 1st day of November, 1839, conveyed to Richard Smith certain premises described in said deed as "all that certain piece or parcel of land situate, lying and being in the town of Granby, in the county of Oswego, known by being lot number three (3) in the original township of Lysander, lying southerly or south-easterly of Fish lake, in Granby aforesaid, and commonly called the Fish Lake lot, supposed to contain sixty-seven acres of land." The plaintiff claims title to the seven acres, under a deed from Asa Phillips and wife to Bradford Kennedy and Abraham Howe, dated January 24, 1862, which purported to convey to the grantees "all that part of lot three in the original township of Lysander (now Granby), lying on the northerly side of Fish lake and adjoining lot seventy-five of the original township of Hannibal." It is inferable from the evidence that at the time of this conveyance the grantees owned a tract of land on lot seventy-five, Hannibal, which, together with the land embraced in the deed from Phillips,

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was subsequently, in the year 1877, conveyed to the plaintiff. It does not appear that there has ever been any actual possession of the land on lot three, Lysander, lying north of Fish lake, under the Norton title. The defendants proved that, in or about 1854, James Ouderkirk, one of the intermediate grantees under that title, went upon the land and cut sticks for "ox bows," and again, in 1862 or 1863, and "looked around;" that he asserted to various persons, at different times, that he owned the land, and that, in 1878, the defendant, John Ouderkirk, got "sassafras" on the land. But these, and a few similar circumstances proved, fall far short of showing actual possession of the land north of the lake by the defendant Wealthy Dexter or her grantors. It is, on the contrary, substantially undisputed that, from 1862, Kennedy and Howe and their grantees have been in the actual possession and occupation of the seven acres, using it in connection with lands on lot 75, Hannibal, for pasturage and other farming purposes. The only actual possession under the Norton title has been of the part of lot 3, lying south of Fish lake, which, as the map approximately shows, and as the plaintiff offered to prove, contained about sixty-seven acres of land. Lot 3 contains 600 acres of land, all of which is covered by Fish lake, except the sixty-seven acres lying south, and about seven acres, in controversy, lying north of the lake. Neither party traces title to the State.

The case was tried on the theory that the rights of the parties turned upon the questions, first, whether the seven acres on the north side of the lake were included in the Norton deed; and, second, whether the deed to the defendant, Wealthy Dexter, was void for champerty. If the first question is decided adversely to the defendants, the consideration of the second will become unnecessary. The defendants rest their claim of title under the Norton deed upon the proposition that as that deed includes, in its descriptive words, "all that piece or parcel of land known as being lot No. 3," and as it is undisputed that the seven acres are within the boundaries of that lot as laid out and surveyed, it is a neces-

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sary conclusion that the deed conveyed the premises in controversy. It will be observed that this construction ignores all the subsequent descriptive words in the conveyance. It disregards the words in the deed locating the land conveyed as situated "on the southerly side of Fish Lake," and also the words describing the quantity of land "supposed to contain sixty-seven acres of land," and the further description "commonly called the Fish Lake lot," which the plaintiff offered to show, was understood as designating the sixty-seven acres lying south of the lake. All these particulars, upon the construction insisted upon by the defendants, are to be rejected as false, being inconsistent with the primary words of description, which include the whole of lot 3. The statement of the supposed quantity, it is insisted, is to be treated as a mistake, and it is assumed that the grantors intended to convey a tract of 600 acres (including the part covered by the lake), instead of a tract of sixty-seven acres, as expressed in the deed.

We think the contention of the defendants is obviously untenable. In construing the language of a written instrument the whole is to be considered in order to ascertain its true meaning and intention. This is as true in respect to the descriptive words in a deed as of any other part of the instrument. Where there is obscurity or uncertainty, all of the particulars in the description are to be taken into account in arriving at the intention, and in the deed in question the particulars describing the location of the land, the quantity, and its commonly known designation, are as much a part of the description of the subject of the conveyance as is the designation of the lot number. It is a familiar rule, in the construction of a deed, that where the description is ambiguous, or there is inconsistency in the several particulars, "words, if necessary, may be supplied by intendment, and particular clauses and provisions qualified, transposed or rejected, in order to ascertain and give effect to the intention." (BEARDSLEY, J., in *Hathaway v. Power*, 6 Hill, 453, 455.) What words or clauses shall be

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rejected or qualified in case of uncertainty, is frequently determined by giving effect to those parts or clauses of the description, which are most certain and to particulars in respect of which the parties would be least likely to have made a mistake. For this reason, by the general rule of construction, monuments control courses and distances, and estimates of quantity are usually subordinated to both. (*Baldwin v. Brown*, 16 N. Y. 359.) The rule that fixed monuments, whether natural or artificial, should usually be given preponderating weight, is obviously reasonable. Variance between actual and estimated quantity of land is not usually a material circumstance, but it may in some cases be an important element in determining the intention of the parties to the grant. In the present case there are very significant circumstances showing that it could not have been the intention of the parties to the Norton deed to convey lot 3 as an entirety. The lines of the lot, if originally indicated by monuments or marked lines, may have been lost or obliterated. The description of the land conveyed as lying "southerly or south-easterly of Fish lake" refers to a natural monument or physical situation which was ascertainable by view. The estimated or "supposed" quantity, sixty-seven acres, is so disproportionate to the quantity contained in the whole of lot 3, that it would have at once arrested the attention of the parties if the conveyance of the whole lot had been intended. We have no hesitation in reaching the conclusion that the part of the description referring to the land intended to be conveyed as "Lot 3" is mistaken or false. It is much more consistent to suppose that the words "on," or "part of," were omitted by inadvertence, than that the parties inserted the other parts of the description by mistake. And if there was any doubt, upon the proof as it stands, of the intention of the parties, the court erred in rejecting evidence of what was known by common reputation as "Fish Lake Lot." This is not the case of cutting down an interest or estate once clearly given, by subsequent indefinite or ambiguous language. All the language in the deed, to which we have referred, is a part

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of a single description, and the sole question is, what land is embraced therein. In the view taken the question whether the plaintiff has acquired title by adverse possession, if without title otherwise, is unimportant.

We think the order for a new trial was properly granted, and it should, therefore, be affirmed and judgment absolute be directed for the plaintiff upon the defendants' stipulation.

All concur.

Order affirmed, and judgment accordingly.

THE BOWKER FERTILIZER COMPANY, Appellant, v. LAWRENCE
N. Cox, Respondent.

This action was for the conversion of a promissory note; the answer alleged a former suit pending. It appeared that in March, 1882, plaintiff commenced an action on contract against defendant to recover the proceeds of said note, and of another, both of which were delivered to defendant to sell and were unaccounted for by him, which action was instituted in reliance upon defendant's representation that the notes had been sold. Judgment was entered in that action by default in April, 1882, for the amount of both notes, and on examination of defendant in supplementary proceedings thereon, in May, 1882, it appeared that he had the note in suit here in his possession when the former action was commenced. Said judgment was vacated on plaintiff's motion, and an order procured for a commission and a reference to examine defendant, after which, in October, 1882, this action was brought. In May, 1883, after notice of trial had been served and eight days before trial, the complaint in the first action was amended so as to limit it to the other note. *Held*, that after discovery of the falsehood of defendant, plaintiff was bound promptly to elect between the then existing action, and a remedy by action *ex delicto*; that the election came too late, and the plea was good.

When the motion to vacate the judgment in the first action was made defendant was imprisoned by virtue of an order of arrest issued therein. No execution against his person had been issued. As a condition of granting the motion the court required plaintiff to stipulate that defendant should be permitted to make application for his discharge at the time he would have been entitled to make it if the judgment had not been vacated and if execution had been issued thereon. The stipula-

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tion was made as required. *Held*, that this did not convert the order of arrest into a body execution and did not operate to discharge and satisfy the cause of action.

(Argued June 16, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 13, 1884, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

This action was brought in October, 1882, for the alleged conversion of a promissory note. The answer set up a former suit pending, and that the judgment was satisfied by the voluntary discharge of defendant from a body execution issued in the former action. Defendant succeeded on both grounds.

The facts, so far as material, are stated in the opinion.

John L. Hill for appellant. The cause of action for the wrongful use of the second note did not arise until its delivery to Coates. (*Walter v. Bennett*, 46 N. Y. 250, 262.) Imprisonment on a body execution simply suspends the proceedings against property so long as the body is held. (Code, § 1490-1494; *König v. Steckel*, 58 N. Y. 476.) The court erred in finding, as a fact, that plaintiff elected to pursue its remedy in the first suit. (Code, §§ 992, 993; *Hazard v. Caswell*, 93 N. Y. 263.) The order limiting the first action has the same effect as if plaintiff had discontinued it and brought a new one. (*Equitable F. Co. v. Hersee*, 33 Hun, 169; 103 N. Y. 25; *Johnson v. Frew*, 33 Hun, 193; *Hays v. Midas*, 104 N. Y. 602.)

John R. Dos Passos for respondent. The present action being for the same identical cause, and between the same parties, as action No. 1, the maxim *memo debet bis vexari pro eadem causa* applies, and the complaint was properly dismissed. (*Averill v. Paterson*, 10 How. 85; 10 N. Y. 500; *McAllister v. Reab*, 4 Wend. 483, 493; *Swart v. Borst*, 17 How. 69.) Upon the facts, the plaintiff being clearly

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bound by its election, this action cannot be maintained. (*Morris v. Rexford*, 18 N. Y. 532; *Sanger v. Wood*, 3 Johns. 416; *Rodermund v. Clark*, 46 N. Y. 357; *Abbott v. Blossom*, 66 Barb. 353; *McGoldrick v. Willetts*, 32 N. Y. 620; *Int. B'k v. Monteath*, 39 id. 297; *Tryon v. Baker*, 7 Lans. 511; *Moller v. Tuska*, 87 N. Y. 166, 169; *Goss v. Mather*, 2 Lans. 283; 46 N. Y. 689; *Kidder v. Whitlock*, 12 How. Pr. 208.) The action was improperly begun, because during the continuance of the imprisonment the judgment was in law deemed satisfied. (*Kaenig v. Steckel*, 58 N. Y. 475; *Cooper v. Bigelow*, 1 Cow. 56; *Rowe v. Guilleaume*, 15 Hun, 462; *Ryle v. Falk*, 24 id. 256; Code Civ. Pro., §§ 1490, 1491.) The defendant being imprisoned under an execution against his person, his subsequent discharge from imprisonment under and pursuant to the orders of Judges BARRETT and DANIELS was in law, upon the facts, a discharge by the consent, acquiescence and neglect of the plaintiff, and thus the said claim, cause of action and judgment became absolutely satisfied and extinguished. (*Rowe v. Guilleaume*, 15 Hun, 462; Code of Civ. Pro., § 1494; *People ex rel. Roberts v. Rowe*, 81 N. Y. 43.) The judgment being clearly proper upon the facts found as to plaintiff's election, even if the other conclusions of law are erroneous, will be sustained. (*Scott v. Pilkington*, 15 Abb. Pr. 280; *East R. B'k v. Gove*, 57 N. Y. 597.)

FINCH, J. The trial court found, as a fact, that at the date of the commencement of this action, and at the time of its trial, there was pending and undetermined an action on contract for the recovery of the money and the proceeds of the note, for the conversion of which this action was sought to be maintained. The case shows that the original action was brought in March, 1882, to recover the proceeds of two notes entrusted to the defendant for sale, and unaccounted for by him, and in reliance upon his statement that both had passed out of his possession. That statement was found at a later date to have been untrue as to one of the notes, which may be

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called, for convenience, the second note, since it was the one for the conversion of which the second and present action was brought. Judgment was entered in the first action, no answer having been interposed, for the amount of both notes. in April 1882, and proceedings supplemental to execution very soon after were instituted. Upon the defendant's examination his misstatement as to the second note was developed, and on the 23d of May, 1882, the plaintiff, as appears by Bowker's affidavit, knew all the facts as to the second note, and the falsehood of the defendant, and was bound to elect between the existing action on contract as to the second note, and an action *ex delicto* for its conversion. The plaintiff, however, took but one step. It caused its own judgment to be vacated, in order, as was said, to ascertain the true amount for which it should be entered. It might have been entered at any day thereafter for the amount of both notes, or only for that of the first, but was not entered at all; and the action remained pending and the default continued when the present action was begun. The plaintiff had opened the door for the election of a new remedy, but stopped at the threshold, and had not made such election, or abandoned its first action for the note when the second action was commenced. At that date two actions were pending, one on contract and one in tort for the same substantial cause. The plaintiff not only retained its hold upon the first action and the power to enter judgment therein for both notes, but took further and important steps in that action. It procured an order for a commission and a reference to examine the defendant relative to his dealing with the notes, and as late as October in that year summoned the defendant to such examination. After that the present action was commenced, and the condition and possible effect of the first action was never changed, till, on the 23d of May, 1883, eight days before the trial of this action, and after notice of trial had been served, the complaint in the first action was amended so as to limit it to the first note alone. That was the only decisive act of the plaintiff, but came too late. If it could have effect as an abandonment

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of the action upon the second note and as significant of a final election after so long a delay and after the pendency of the first action had been pleaded as an answer to the second, it certainly would be very unreasonable to allow it such or any effect whatever when delayed until after the second action was noticed for trial. (*Swart v. Borst*, 17 How. 69.) Possibly the defendant's plea of a prior action pending could only be defeated by an order of discontinuance. (*Averill v. Paterson*, 10 N. Y. 500.) But in any event the amendment of the complaint, if available at all, should have been made promptly after the need of a choice of remedies had become apparent. The trial court was, therefore, justified in ordering judgment for defendant.

But that judgment was also put upon a ground which we do not approve, and which gives it an effect to which the defendant is not entitled. When the motion to vacate the first judgment was made by the plaintiff, the defendant was imprisoned by virtue of an order of arrest issued in that action. No execution against his person had yet been issued or served. The effect of vacating the judgment was to postpone, indefinitely, such execution and leave the defendant under arrest for a prolonged and indefinite period. To obviate that injustice, and keep the imprisonment within what would have been its normal duration, the court required the plaintiff to stipulate, as a condition of vacating the judgment, that the defendant should "be permitted to make application to the court for his discharge *at the time* when he *would* have been entitled to make such application if said judgment had not been vacated, and if an execution against his body had been duly issued thereon." This condition, which the plaintiff accepted, did not convert the order of arrest into a body execution. Its purpose and effect was to permit a motion for a discharge at a specified time, and to prevent an answer to the motion at such date that no body execution had been served; but the resultant discharge was from arrest under the order and that alone, and could not have the effect to discharge and satisfy an indefinite cause of action which had not, as yet, even ripened into

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judgment. Such a result was not contemplated by the conditions, or within its reasonable scope, and should not be argued out from a stipulation silent upon the subject, and aimed to accomplish a single and specified purpose. We, therefore, affirm the judgment upon the first ground stated, and that only.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN J. MACK, Respondent, v. THE ROCHESTER GERMAN
INSURANCE COMPANY OF ROCHESTER, N. Y., Appellant.

A policy of fire insurance contained a provision declaring that "the working of carpenters * * * and other mechanics in * * * altering or repairing" the building covered by the policy, would cause a forfeiture of all claims" under it, unless the written consent of the company was indorsed thereon. It also provided that if the risk should be increased by any means within the control of the assured the policy would be void. The building was, at the time of the insurance, occupied as a grocery store. In an action upon the policy it appeared that plaintiff, after it was issued, leased the building to be used for the purpose of carrying on the fruit drying business, which required substantial alterations in the building, among others the removal of portions of two floors and the roof, and the construction of large wooden flues extending up through the building from the cellar and above the roof. These alterations were being made without defendant's consent, and while carpenters were engaged in the work the building was destroyed by fire. *Held*, that the evidence showed a violation of the conditions of the policy which rendered it void; and that a submission of the question to the jury was error.

(Argued June 17, 1887; decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made January 13, 1885, which reversed a judgment in favor of defendant entered upon a verdict directed by the court

This action was upon a policy of fire insurance.

The material facts are stated in the opinion.

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George F. Yeoman for appellant. The words of the policy must be taken in their ordinary sense as commonly used and understood. (*Herrman v. Merch. Ins. Co.*, 81 N. Y. 184.) If the warranty had been that the risk was detached from such building as the one actually within the distance fixed, there would have been a breach of the warranty, and the plaintiff could not have recovered whether the risk was increased or not. (*O'Neil v. B. Ins. Co.*, 3 N. Y. 122; *Murdock v. Che. Co. Mut., etc.*, 2 id. 210, 220; *Duncan v. Sun F. Ins. Co.*, 6 Wend. 489, 494.) The provision of the policy "that the working of carpenters * * * in altering * * * any building or buildings covered by this policy will cause a forfeiture of all claim under this policy without the written consent of the company indorsed thereon" was applicable to all alterations in the premises insured. (Wood on F. Ins., § 244; May on Ins., § 247; *Harris v. Col. Mut., etc.*, 4 O. 285; *Howell v. B. Eq. Co.*, 16 Md. 377; *Rann v. Home Ins. Co.*, 59 N. Y. 337.) The court erred in rejecting defendant's offer to prove by one Falkner, who was a member of the firm that countersigned the policies, that the night before the fire he waived, orally, the forfeiture caused by the working of the carpenters. (*Bush v. West. F. Ins. Co.*, 63 N. Y. 531; *Sohnes v. Ins. Co. of N. A.*, 121 Mass. 438; Wood on F. Ins. 649 *et seq.*; *Marvin v. Univ. L. Ins. Co.*, 85 N. Y. 278, 282; *Walsh v. H. F. Ins. Co.*, 73 id. 5; *Van Allen v. Farmers', etc., Ins. Co.*, 64 id. 469; *Steen v. Nia. F. I. Co.*, 89 id. 315.) The violation of the provision in the policy as to the working of carpenters avoids it, whether the act was done with or without the consent of the assured. (May on Ins., § 227; *Duncan v. Sun F. Ins. Co.*, 6 Wend. 489, 494; *Shepard v. Un. M., etc., Co.*, 38 N. H. 232, 240; *Trustees of F. Assur. Co. v. Williams*, 26 Penn. 196; *Diehl v. B. Eq. So.*, 19 Md. 377; *Appleby v. F. Fund Ins. Co.*, 45 Barb. 454.)

William H. Kenyon for respondent. There was no repairing of the building within the prohibition of the policy.

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(*Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220, 226; *Wood on F. Ins.*, § 244; *May on Ins.*, § 240.) Such restrictive language in a policy has no application to the ordinary casual work necessary about a building. Its object is only to "prohibit such hazardous use as is generally denominated builders' risk." (*N. Y. E. Ins. Co. v. Langdon*, 6 Wend. 623; *Dobson v. Sotheby*, 1 M. & M. 90; *Shaw v. Robberds*, 1 N. & P. 279; *Buchanan v. Exch. F. Ins. Co.*, 61 N. Y. 25, 28, 29.) Even in the case of warranties, where the language gives opportunity for construction, the same principle applies. (*Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220, 226; *Morrison v. Wis. O. F. Mut. L. Ins. Co.*, 59 Wis. 162, 170; *Grattan v. Met. L. Ins. Co.*, 92 N. Y. 274, 279, 282; *Summers v. U. S. Ins. Co.*, 13 La. An. 504.) Conditions which work a forfeiture are not to be extended by implication or construction. Being for the benefit of the insurer, they will be construed most liberally for the insured. (*Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417, 421; *Rann v. Home Ins. Co.*, 59 id. 387; *Mulville v. Adams*, 19 Fed. R. 887; *May on Ins.* [2d ed.], § 222.) Whether or not there was a breach of the conditions of the policy that "the working of carpenters, * * * in building, altering or repairing any building or buildings covered by this policy will cause a forfeiture of all claim under this policy," was a question of fact for the jury. (*Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417-421; *Uhrig v. W. City F. I. Co.*, 101 id. 362-366; *Delahunt v. Aetna Ins. Co.*, 97 id. 537-541; *Sherwood v. Mer. M. Ins. Co.*, 66 id. 630; *Cornish v. Farm Bldgs. F. Ins. Co.*, 74 id. 295; *Wqit v. Agr. Ins. Co.*, 13 Hun, 371, 374; *Carr v. P. & W. I. Co.*, 38 id. 86; *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220, 226; *Wood on F. Ins.* § 244; *Gannon v. Un. Fer. Co.*, 29 Hun, 431; *W. M. L. Ins. Co. v. Wilkinson*, 13 Wall. 222; *Whitney v. Black R. Ins. Co.*, 72 N. Y. 117; *Hinds v. Schenectady Co. M. Ins. Co.*, 11 N. Y. 554, 562.)

RUGER, Ch. J. The policy of insurance upon which this action was brought contained among others the following provi-

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sious: "The working of carpenters, roofers, gas-fitters, plumbers and other mechanics, in building, altering or repairing any building or buildings covered by this policy, will cause a forfeiture of all claim under this policy, without the written consent of this company indorsed hereon." It was also provided that the policy should be void "if the risk be increased by any means within the control of the assured."

At the Circuit a verdict was directed in favor of the defendant, upon the ground that the loss occurred during a violation of the conditions of the policy by the plaintiff, and while the building was being occupied by carpenters in making alterations therein without defendant's written consent. The General Term was of the opinion that the evidence presented a question of fact for the jury, and that the trial court erred in directing a verdict. We differ with the General Term. There was no material conflict in the evidence, and the following facts were undisputed: The policy in question was issued January 29, 1881, and the fire occasioning the destruction of the building took place on October eleventh, thereafter. At the time of the insurance the building was occupied as a grocery store by a tenant of the plaintiff, and continued to be so occupied until about October first. On September 29, 1881, the plaintiff executed a lease of the building to other tenants, who contemplated using it for the purpose of carrying on the business of drying fruit, and the lease provided that they should have the privilege of putting the machinery needed for their business into the building. This business required some alterations in the structure, and the introduction therein of a furnace and wooden shafts or boxes running from the cellar to the roof, and constituting the driers in which fruit was intended to be cured by heat. These driers required, in their formation, the cutting of large holes, five feet square, through each floor of the building and its roof, and the removal of the timbers, boards, scantling and plastering, constituting the flooring and roofing, and the rebracing of the joists or sleepers of the several floors. They

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also required the introduction of wooden boxes or shafts running from the cellar to six feet above the roof, divided into compartments, for holding the fruit while it was in process of being dried. These boxes were made of boards securely fastened to pine scantlings at each corner of the box and forming a well or shaft from cellar to roof. From about October first to the time of the fire, carpenters were engaged in making these changes as well as making tables and other conveniences for carrying on the business of drying fruit, and these improvements had not been completed when the building was destroyed.

The General Term assumed that the making of ordinary and necessary repairs to a building to preserve it from decay, or the cutting of a stove pipe hole in a partition, or other similar acts, would not be a breach of the conditions of the policy, and, therefore, the question here presented could not be held as a question of law to constitute such an alteration of the building by carpenters as would violate the conditions of the policy. These illustrations do not seem to us to be applicable to this case, or to afford any authority for the proposition that a jury were authorized, in such a case as the present, to find that the covenants were not violated by the plaintiff. The General Term properly laid down the rule by which such instruments should be construed, and held that they should receive a reasonable construction, reference being had to the object sought to be attained by the parties. It was also said that "such conditions are not to be extended by implication so as to include cases not clearly or reasonably within the words as ordinarily used and understood."

We have no difficulty in agreeing with the rules of law laid down by that court, but we are quite unable to concur in the view taken by it of the evidence. The provision of the policy governing the case is framed in plain, unambiguous language, and its object and design are reasonable and free from any doubt. Certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance and they, unless corresponding premiums are paid for the extra risks, are usually intended to be excluded from

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the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions, when plainly expressed in a policy, are binding upon the parties and should be enforced by courts, if the evidence brings the case clearly within their meaning and intent.

It tends to bring the law itself into disrepute, when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable and material obligation of the contract. There can be no reasonable question but that the evidence here showed a clear and deliberate attempt to change the character of the occupation of the insured building from a comparatively safe to a hazardous one, and a substantial alteration of the structure by carpenters. These alterations required the removal of large portions of two floors and the roof, and the introduction therein of two flues constructed of inflammable materials and extending through the entire height of the structure, affording every means for the spread of conflagration and constituting a large increase of combustible material. The case is brought clearly within the spirit as well as the letter of the contract, and if it does not show a violation of the conditions, we can conceive of no situation which would have effected that result. In case there had been a submission of the facts to the jury and it had found that carpenters were not engaged in making alterations of this building within the meaning of the policy, it would have been the clear duty of the court to have set aside the verdict.

Courts are under no obligation to yield their assent to verdicts which deny significance to language, or violate the plain meaning and intent of an unambiguous contract.

The order of the General Term should be reversed and the judgment entered upon the verdict affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

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142	210
106	566
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THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,
Respondent, v. THE ATLAS STEAMSHIP COMPANY (LIMITED),
Appellant.

The jurisdiction of the fire department of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, includes structures on the wharves and piers owned by the city as well as those owned by private individuals. (PECKHAM, J., dissenting.)

The jurisdiction given to the dock department over the wharves and piers belonging to the city, and the structures thereon, by the act of 1871 (§ 99, chap. 574, Laws of 1871), gives to that department exclusive charge and control, such as a private owner has of structures owned by him; it does not interfere with the building and fire law or the power of the officers having charge of the execution thereof. (PECKHAM, J., dissenting.)

The history of legislation in relation to buildings and the prevention of fires in said city, given.

Whether the fire department acts independently as a distinct entity, with corporate powers, or as an agency of the city, it is not estopped from claiming against a lessee of one of the city wharves obedience to the building laws, and all orders and regulations lawfully made, in pursuance thereof, by the fact that the lease contains provisions in contravention of those laws and orders.

Accordingly *held*, in an action against a lessee of a pier belonging to the city, to recover the penalty imposed by the act of 1871 (§ 32, chap. 625, Laws of 1871), because of a violation of the requirements of a permit granted by the board of examiners for the erection of a structure on said pier, that plaintiff was not estopped by a provision in the lease authorizing the structure to be erected in a manner different from said requirements.

The provision of the act of 1874 (§ 8, chap. 547, Laws of 1874) constituting the board of examiners, is not violative of the provision of the State Constitution (§ 2, art. 10), requiring all city officers, whose election or appointment is not provided for by the Constitution, to be elected by the electors of the city or appointed by the authorities thereof designated by the legislature for that purpose. The members of the board are not, as such, city officers.

Even if they are to be considered city officers, as their offices were created subsequent to the adoption of the Constitution, they do not come within its purview.

The determination of said board of examiners as to the mode of construction of a building, if their requirements are not wholly impracticable, even if they are unreasonable, may not be reviewed by the courts.

(Argued April 17, 1887; decided October 4, 1887.)

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APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made May 12, 1885, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Everett P. Wheeler for appellant. The dock department has exclusive jurisdiction over plans for all structures and piers on any part of water-front. (*Southern L. I. Co. v. Packer*, 17 N. Y. 51; *Yeaton v. U. S.*, 5 Cranch, 281; *Hartung v. People*, 22 N. Y. 95, 99; *Town of Duaneburgh v. Jenkins*, 57 id. 177, 191.) Before the passage of chapter 517, Laws of 1884, the dock department had exclusive jurisdiction over plans for structures on piers belonging to the city. (Laws of 1870, chap. 137, art. 4, p. 372, § 99; p. 390, §§ 97, 98; Laws of 1871, chap. 574, § 6, pp. 1235, 1244; Laws of 1866, chap. 873, § 27, p. 2025; Laws of 1874, chap. 547, § 8; *Smith v. People*, 47 N. Y. 330, 339; *People v. Morrison*, 78 id. 84.) The dock department has the exclusive charge and control of all structures on piers belonging to the city, and of the plans according to which the same should be built. (*In re N. Y. & B. B'dge*, 72 N. Y. 527; *People v. McClave*, 99 id. 83, 89; *Vedder v. Mudgett*, 95 id. 295, 313; *McAndrew v. Whitlock*, 52 id. 40; *Whipple v. Christian*, 80 id. 523; 66 id. 414; 47 id. 330; *In re D. & H. C. Co.*, 69 id. 209; *People v. Brinkerhoff*, 68 id. 259; *L. & B. R. Co. v. Bd. of W'ks.*, 3 K. & J. 123; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 466; *Witty v. Matthews*, 52 id. 512; *Hare v. Horten*, 5 B. & Ad. 715.) The defendant was not estopped by submitting plans to the fire department. (Bigelow on Estop [4th ed.], 445; *Plumb v. Catt. Co. Ins. Co.*, 18 N. Y. 392; *Brown v. Bowen*, 30 id. 219, 541; *In re Kings Co. El. R. R. Co.*, Ct. App. March 52, 1887; 4 Wall. 2; 60 N. Y. 559.) The city being the landlord, must protect its tenant's possessions. (*Mayor, etc., v. Mabie*, 13 N. Y. 151; *Mack v. Patchin*, 42 id. 167, 174; *People v. Draper*, 15 id. 532; *People v. Pinck-*

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ney, 32 id. 377; Laws of 1870, chap. 137, art. 10, § 84; *O'Leary v. Bd. of Education*, 93 N. Y. 1; *Curnen v. Mayor, etc.*, 79 id. 511; *Brooklyn v. B. C. R. R. Co.*, 57 Barb. 497; *Indiana v. Milk*, 11 Fed. Rep. 389; *Cook Co. v. Harms*, 108 Ill. 151; *Pet. R. R. Co. v. N. & L. R. R. Co.*, 59 N. H. 385; Laws of 1873, pp. 484, 489, 491, §§ 1, 19, 26; 1 Greenl. Ev. § 536; *How v. B., N. Y. & L. E. R. R. Co.*, 37 N. Y. 297; *Willis v. Bk. of England*, 4 Ad. & Ell. 21, 39; *Bk. of Utica v. Mersereau*, 3 Barb. Ch. 528. 577; *Huff v. Hutchinson*, 14 How. [U. S.] 586; *Benton v. Woolsey*, 12 Pet. 27.) The legislature had no power to confer upon the board of examiners the authority to determine whether the shed upon the pier would be a violation of the law prohibiting the construction of buildings, or whether it would be dangerous in case of fire without being lined with wire netting, plastered with mortar. (Const. of 1846, § 2, Art. 10; Laws of 1874, chap. 547, § 8; Davies' Laws of City of N. Y. 488, § 84; id. 880; *People v. Albertson*, 55 N. Y. 50, 55; *S. P. L. S. R. R. Co. v. Roach*, 80 N. Y. 339; *People v. Raymond*, 37 id. 428; 35 How. Pr. 173; *People v. Keeler*, 29 Hun, 175; *In re Kings Co. El. R. Co.*, 105 N. Y. 97; 2 Wash. R. Prop. [3d ed.] 6; *Martin v. Dry Dock Co.*, 92 N. Y. 70; *U. S. v. Arredondo*, 6 Pet. 691.) The condition exacted by the board of examiners was unreasonable. (Code, § 993; 2 Kent's Com. 296; *Dunham v. Trustees of Roch.*, 5 Cow. 465; *Lynch v. Met. R. Co.*, 90 N. Y. 77; *Kent v. Q. Min. Co.*, 78 id. 182; *Tripp v. Cook*, 26 Wend. 143, 152; *Condit v. Baldwin*, 21 N. Y. 219; *Stewart v. Moss*, 79 id. 629; *Beck v. Sheldon*, 48 id. 365; *Putnam v. Hubbell*, 42 id. 106; *Pollock v. Pollock*, 71 id. 137; *Sickels v. Flanagan*, 79 id. 224.) The subject-matter of this suit is wholly municipal, and the law having vested exclusively in the dock department the police power of regulating the construction of sheds or piers belonging to the city, the fire department has no jurisdiction of the subject and no police power over it. (Consolidation Act, §§ 44, 106, 619, 714, 716; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *People ex rel. Ryan v. Civil Service Board*, 103 id. 357; 41 Hun 287.)

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William L. Findley for respondent. The fire department, in the enforcement of the provisions of the building laws applicable to the city, does not act as the agent of the municipal corporation, and is not, therefore, estopped by anything done in the premises by any officer of the city government. (*Maximilian v. Mayor, etc.*, 62 N. Y. 160.) The office of examiner, created by section 8, chapter 547, Laws of 1874, having been established subsequent to the adoption of the Constitution of 1846, is not one of those which, pursuant to article 10, section 2 of the Constitution, must be filled by election by the people or appointment by some local authority. (*Wood v. Draper*, 15 N. Y. 522.) The powers and duties of the old fire wardens were transferred to the "department for the survey and inspection of buildings." (Laws of 1862, chap. 356, § 45; Laws of 1849, chap. 84, §§ 28, 29; Laws of 1850, chap. 120, §§ 1, 2; Laws of 1871, chap. 625; Laws of 1874, chap. 547; Laws of 1880, chap. 521.) The board of fire commissioners and their subordinate, the inspector of buildings, are successors of the old fire wardens. (Laws of 1874, chap. 547, § 8; Laws of 1885, chap. 456, § 31.) The imposition of the condition in the erection of this building was within the powers of the board of examiners, and will not be reviewed or set aside by this court unless it is shown that the condition itself is so clearly impossible of performance, or would be so useless and inoperative, if carried out, that the court can say, as matter of law, that the requirement is an abuse of the powers conferred by the statutes. (*In re Wright*, 29 Hun, 357; *People v. Mayor, etc.*, 32 Barb. 102; *Baker v. Boston*, 12 Pick. 184.) At the time when the action was brought the respondent had, and still has, that jurisdiction over structures upon the piers, slips and bulk-heads of the city which this action asserts. (Laws of 1866, chap. 873; Laws of 1871, chap. 625, § 24; Laws of 1874, chap. 547; Laws of 1880, chap. 521; Laws of 1881, chap. 687, § 1.) The approval of specifications and plans by the superintendent of buildings means: That as to matters specified and provided for in building laws, he shall determine that the specifications and

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plans are in accordance with the provisions of law ; and as to matters not specially provided for in the law, shall exercise the discretion to determine and decide the manner of construction and materials to be used in the erection of the buildings. (Laws of 1871, chap. 625, § 24; Laws of 1885, chap. 456, § 24; Laws of 1874, chap. 547, § 8; Laws of 1881, chap. 687, § 1; Laws of 1882, chap. 410; Laws of 1884, chap. 517.)

EARL, J. The defendant, a foreign corporation, leased from the city of New York for a term of years the pier at the foot of West Twenty-fifth street, and on the 11th day of October, 1881, filed in the office of the bureau of inspection of buildings, in the fire department of the city, plans and specifications for the erection of a wooden shed upon that pier, and made application for a permit to erect the same. The application was put before the board of examiners created by section 8 of chapter 547 of the Laws of 1874, and was granted upon certain conditions, among which was one that the interior of the building should be covered with iron wire netting plastered with mortar. The defendant erected, and is now occupying the building, but without complying with the condition mentioned.

This action was brought to recover the penalty imposed by section 32 of chapter 625 of the Laws of 1871, and also to restrain the defendant from further occupying and using the building until the requirements of the permit for its erection shall be complied with. The action was tried at an equity term of the court and judgment was rendered in favor of the plaintiff. This appeal is from the affirmance of that judgment at the General Term.

The judgment is assailed upon four grounds which we will examine separately: (1.) It is claimed that the fire department had no jurisdiction whatever over this building upon the pier, but that its plan and structure were exclusively under the jurisdiction and subject to the control of the dock department; and to solve the question thus raised we are required to examine various statutes applicable to the city of

New York. In the act "to reduce general laws relating particularly to the city of New York into one act," passed April 9, 1813, many regulations were made for the prevention of fires, and the common council was authorized to pass ordinances for that purpose. In pursuance of the power thus conferred, the common council passed ordinances providing for the appointment of fire wardens charged with the duty and clothed with the power to examine buildings and other structures and combustible materials, and to enforce the regulations contained in statutes and ordinances for the prevention of fires. The powers and duties of fire wardens were transferred to the captains of police by the act (chap. 315 of the Laws of 1844), and were conferred upon the assistant engineers of the fire department by section 28 of the act (chap. 84 of the Laws of 1849). By the act (Chap. 120 of the Laws of 1850) provision was made for the appointment of twelve fire wardens, who were to possess the powers and discharge the duties which had previously been devolved upon the assistant engineers. Under the acts (Chap. 470 of the Laws of 1860, and chap. 356 of the Laws of 1862) extensive and minute provisions were made for the inspection of buildings and for protection against fires, and there can be no question that down to the year 1866 all the laws enacted for the inspection of buildings and for protection against fires in the city of New York were, by their general terms, just as applicable to buildings upon wharves and piers as to other buildings, and for precisely the same reasons. In the latter year an act (Chap. 873) was passed "to amend and reduce to one act the several acts relating to buildings, and the keeping and charge of combustible materials in the city of New York," in section 27 of which it was specially provided "that all steamboat and ferry-houses, or other structures upon or adjoining any pier, slip or bulk-head in said city, may and shall be constructed in such manner as said superintendent (of buildings), shall determine and designate under his certificate, first, to be obtained therefor." This provision plainly applied, not only to structures upon private wharves and piers, but also to

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structures upon the wharves and piers owned by the city. In 1871 another general building act (Chap. 625), was passed, and in section 24 it was again especially provided that "all steamboat and ferry-houses or other structures upon or adjoining any pier, slip or bulk-head in said city shall not be constructed, except in such manner and of such materials as said superintendent of buildings shall determine and designate, under his certificate, first to be obtained therefor." Prior to the year 1871, there had, by law, been created in the city of New York, a fire department, and a department of buildings, and the chief officer of the latter department was styled superintendent of buildings. The act of 1871 was amended in 1874, by chapter 547 of that year, and section 8 of the latter act amended section 31 of the former act so as to make it read as follows: "The department of buildings, named under this act, shall have full power in passing upon any question relative to the mode, manner of construction or materials to be used in the erection, alteration or repair of any building in the city of New York, where the same is not specially provided for herein, to make the same conform to the true intent, meaning and spirit of the several provisions hereof; and shall, also, have discretionary power upon application therefor, to modify or vary any of the several provisions of this act, to meet the requirements of special cases where the same do not conflict with the public safety and public good, so that substantial justice may be done; but no such discretion shall be permitted, except a record of the same shall be kept by said department, and a certificate be first issued to the party applying for the same; such certificate shall be passed upon previously by a board of examiners, consisting of the superintendent of buildings, a member of the examining committee of New York Chapter of the American Institute of Architects, one of the ex-presidents of the New York Board of Underwriters, and two members of the Mechanics and Traders' Exchange of said city, one of the latter of whom shall be a master carpenter, and one a master mason, all of whom, except said superintendent, shall be selected by their respective organizations,

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and so certified by the proper officers to the said superintendent. * * * The members of said board, excepting said superintendent, shall each be entitled to and shall receive ten dollars for each attendance at a meeting of said board, * * * but in no case shall they be entitled to receive compensation for more than two meeting in any one month. And provided, further that no permit for the erection of any structure on any wharf, pier or bulk-head, shall be issued by the superintendent of buildings, except by and with the approval of the said board of examiners." While the legislature was thus dealing with the act of 1871, and amending several sections thereof, it did not touch the provision thereof above quoted, but, by the last clause of section 8, simply placed a limitation upon the jurisdiction of the superintendent of buildings in granting permits for the erection of structures upon wharves, piers and bulk-heads, and that limitation clearly applied to wharves, piers and bulk-heads owned by the city, as well as to those owned by individuals.

The next legislative act upon this subject is chapter 521, of the Laws of 1880, which abolished the department of buildings and the office of superintendent of buildings; created the bureau of inspection of buildings as a branch of the fire department, with an inspector of buildings at its head, and conferred upon the fire department and the inspector all the powers that had theretofore belonged to the department and the superintendent of buildings, respectively; and thus that department, and the inspector also, became possessed of all the powers which, at a still earlier date, had been exercised by the fire wardens.

Section 30 of the act of 1871 required that before the erection, construction, alteration or repair of any building in the city should be commenced, the owner, architect or builder should notify the superintendent of buildings, and submit to him a detailed statement of the specifications and plans, and that the erection, construction, alteration or repairs of the building should not be commenced or proceeded with until the specifications and plans should have been approved by the

superintendent. That section was amended by chapter 687 of the Laws of 1881, among other things, by substituting the fire department and inspector of buildings in the place of the superintendent of buildings.

In the consolidation act (chap. 410 of the Laws of 1882, § 495) the provision as contained in the acts of 1866 and 1871, above quoted, was continued, and the last clause of section 8 of the act of 1874, above quoted, was also continued as the last clause of section 504. In 1885, after judgment in this action, several sections of the consolidation act were amended, and among those amended was section 504, but the last clause as it before existed was continued. These statutes, it seems to us, clearly indicate the legislative purpose.

The executive officers of the fire department, under whatever name it existed, were, at all times, required to be men of technical skill and knowledge, and to them was committed the protection of the city against fires. In the language of the statute, no buildings or structures within the fire limits were excepted from their jurisdiction, and since 1866, by express provision, all structures upon all wharves and piers were subjected to their regulation and control, like the other buildings in the city; and the contention of the defendant rests wholly upon the statute to which attention must now be called.

In 1870, by chapter 137, the legislature adopted a new charter for the city, which provided that the city government should consist of several co-ordinate departments. Among them were the department of docks, the fire department and the department of buildings. The powers of these departments were not particularly defined, but they were left to the operation of existing laws. The charter act of 1870 was amended by chapter 574 of the Laws of 1871, and the powers of the dock department were defined and greatly enlarged. By an amendment of section 99 of the former act it was provided as follows: "The department of docks in the city of New York shall have exclusive charge and control, subject in the particulars hereinafter mentioned to the com-

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missioners of the sinking fund of said city, of all the wharf property belonging to the corporation of the city of New York, including all the wharves, piers, bulk-heads and structures thereon, and waters adjacent thereto, and all the slips, basins, docks, water-fronts, land under water, and structures thereon, and the appurtenances, easements, uses, reversions and rights belonging thereto, which are now owned or possessed by the said corporation, or to which said corporation is or may become entitled, or which said corporation may acquire under the provisions hereof, or otherwise; and said department shall have exclusive charge and control of the repairing, building, rebuilding, maintaining, altering, strengthening, leasing and protecting said property, and every part thereof, and of all the cleaning, dredging and deepening necessary in and about the same. Said department is also hereby invested with the exclusive government and regulation of all wharves, piers, bulk-heads and structures thereon, and waters adjacent thereto, and all the basins, slips and docks, with the land under water in said city not owned by said corporation. The duties and powers heretofore performed and exercised by any officer, department or bureau of the said corporation in and about all or any part of the said property, are hereby transferred to and vested exclusively in the said department; but this provision shall not affect the aforesaid powers of the commissioners of the sinking fund." Here is certainly very broad and sweeping language, and, standing alone, it would be sufficient to uphold the contention of the defendant. But what was the apparent object of the law-makers? They were not legislating in reference to the protection of the city against fires, and probably did not have that matter in mind. It is not to be supposed that they meant, for the first time in the history of the city, to remove structures upon wharves and piers entirely out of the operation of the building and fire laws applicable to the city and from the protection of the skilled officers who had charge of the execution of those laws. What reason could there be for exempting such structures from the operation of those laws while every

other structure in the city remained subject to them? The language is satisfied by construing it to give to the department the exclusive charge and control of the wharves and piers belonging to the city and the structures thereon and of the repairing, building, maintaining and leasing, governing and regulating the same, such as a private owner would have of any structures owned by him in the city. There is certainly nothing in the language which obliges us to construe it as giving the department the exclusive power to determine and approve the plans and specifications for such structures and thus to override the building and fire laws framed with great care for the protection of the city. This is made more clear, and we may say with propriety entirely clear, when we see that the same legislature, at the same time, had under consideration the amendment of the building laws, which was accomplished only two days later, by the act chapter 625 above referred to, in section 24 of which the structures upon wharves and piers were by the language, which we have heretofore quoted, expressly placed under the jurisdiction of the superintendent of buildings. And still further confirmation is given to these views by the still further legislation above referred to when the matter of the protection of the city against fires was expressly the subject of consideration and of legislation. The provision above quoted, giving the dock department the exclusive charge and control, is also found in the consolidation act of 1882, which also contains the special provision above quoted giving the fire department the jurisdiction of structures upon wharves and piers. All these various statutes should be so construed, if possible, that they will harmonize and stand together and so as not to bring them into conflict with each other, and this can be done by subjecting the structures upon the wharves and piers of the city to the building laws of the city and to the jurisdiction of the officers who have charge of the execution of such laws. The only other alternative is to hold that the structures upon wharves and piers belonging to the city, although erected by private individuals, are not included in the sweeping and explicit language

of the building acts, and this we cannot do without doing violence to the language used and to the policy upon which we believe all the legislation was based. The main contention of the defendant upon this appeal must therefore fail.

(2.) The defendant, by its lease of the pier from the dock department, was not authorized to violate the building laws applicable to the city. No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any law enacted for the public safety. Therefore, whether the plaintiff acts independently as a distinct entity with corporate powers within the doctrine of *Maximilian v. Mayor, etc.* (62 N. Y. 160), or whether it acts as an agency of the city, representing it, it is not, as contended by the defendant, estopped from claiming against the defendant obedience to the building laws, and all orders and regulations lawfully made in pursuance thereof. If the dock department made an illegal lease to the defendant, it may surrender the pier and refuse thereafter to pay rent. But while it retains the pier it must comply with the law and pay rent.

(3.) It is contended, on behalf of the defendant, that section 8 of chapter 547 of the Laws of 1874, so far as it constitutes the board of examiners, is invalid as in conflict with section 2 of article 10 of the Constitution. The members of that board, excepting the superintendent of buildings, are not required to be elected by the electors of the city or of any division thereof, nor are they required to be appointed by any of the city authorities, and hence, if they were city officers, there might be some ground for the contention of the defendant. But they are in no sense city officers. They receive no salary, take no oath of office and have no tenure or term of office. Aside from the superintendent, no one of the examiners can at any time be said to be in office or to hold any office. These examiners are not permanent for any time. They can only act when they have been designated in the mode pointed out in the section, and may be changed at any meeting of the board. They are mere experts employed on behalf of the

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city as an architect or skilled foreman or boss mason or boss carpenter might be employed, and they have no official characteristics. But if they could be called officers, their offices were created subsequently to the adoption of the Constitution, and hence they do not come within its purview. (*Wood v. Draper*, 15 N. Y. 532; *People v. Palmer*, 52 id. 83.) We do not find that, prior to 1846, there were any city officers with the powers or even substantial functions devolved upon these examiners

(4.) We cannot say that it was impossible for the defendant to comply with the requirement of the examiners that the interior of the building should be covered with iron netting and plastered with mortar. The findings of the trial judge, supported by some evidence, conclude us. The examiners had jurisdiction of the matter, and their determination cannot be reviewed by the courts, even if their requirement was unreasonable, so long as it was not wholly impracticable.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur, except PECKHAM, J., who dissents upon the ground that the subject was under the exclusive jurisdiction of the dock department.

Judgment affirmed.

Statement of case.

JOHN E. FURMAN, Appellant, v. THE UNION PACIFIC RAIL-ROAD COMPANY, Respondent.

The law allows of no excuse to a common carrier for a wrong delivery of goods entrusted to him for transportation, except the fault of the shipper himself; and where there is any doubt, which may be determined by documentary evidence, its production should be required.

It is the duty of a carrier, at common law as well as under the factors' act of this State, to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming under that title, and to deliver in accordance with it; if delivery is made without it he runs the risk of showing a delivery in accordance with its instructions.

Plaintiff's assignees delivered to the B. S. P. Co., at Norfolk, Va., 100 bags of peanuts, marked "Y," for shipment to Denver, receiving a bill of lading, in which, after specifying the property, the weight and freight, was the following: "Marked Y, order notify Zucca Bros." In the course of transportation the peanuts were delivered to defendant. It received no bill of lading or copy thereof from the preceding carrier and it was not notified that any had been issued. It received a "transfer sheet" which contained this entry: "Consignee 'Y,' Huq, Zucca Bros." The same entry was made in the way-bill made up by defendant's agents at the forwarding station, but under a column therein headed "consignee and destination," the destination but no consignee was given. Defendant received no other notification as to the ownership or disposition of the goods. It delivered them at Denver to Zucca Bros., without the production or surrender of the bill of lading. That firm had no title to or interest in the goods and had refused to pay a draft drawn upon them by the shippers, forwarded for collection, which was attached to the bill of lading; these papers had, in consequence, been returned to the shippers. *Held*, that defendant, upon failure to deliver to plaintiff on demand, became liable for a conversion of the goods; that the use of the word "notify" in the bill of lading showed that Zucca Bros., were not intended as the consignees, and as none were named, no delivery could be safely made without production of the bill.

It seems that a carrier receiving goods from another carrier is not justified in a delivery to the wrong person without a bill of lading, where one was made, although the delivery was in accordance with the papers received from the preceding carrier in which a different consignee is named from the one named in the bill.

(Argued June 16, 1887; decided October 4, 1887.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of January, 1885, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was for the alleged conversion of one hundred bags of peanuts.

The material facts are stated in the opinion.

Robert L. Harrison, for appellant. The contract with the Baltimore Steam Packet Company (the first carrier), contained in and evidenced by the receipt or bill of lading, bound each and every one of the connecting carriers who accepted the goods and transported them over its line. (*Maghee v. C. & A. R. R. Co.*, 45 N. Y., 514; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 497; *Halliday v. St. L., K. C. & N. R. R. Co.*, 74 Mo. 159.) The terms of the bill of lading did not justify the delivery of the goods to Zucca Brothers without production and surrender of the bill of lading. (*B'k of Com. v. Bissell*, 72 N. Y. 615; *B'k of Peoria v. N. R. R. Co.*, 58 N. H. 203; *The Thames*, 14 Wall. 98; *Joslyn v. Gr. T. R. Co.*, 51 Vt. 92.) The defendant was bound to deliver the goods in accordance with a bill of lading, and a failure to do so worked a conversion. (Hutchinson on Carriers, 102; *Willard v. Bridge*, 4 Barb. 361; *Guillaume v. Gen. Trans. Co.*, 100 N. Y. 501.) No variance of the contract made by any intermediate carrier without the consent of the shipper would be binding upon him, and the shipper would not be liable for the negligence of any intermediate carrier in direct contravention of his contract. (*C., H. & D. R. R. Co. v. Spratt*, 2 Duv. 4.) The defendant was charged with knowledge of the contents of the bill of lading. (*City B'k v. R., W & O. R. R. Co.*, 44 N. Y. 136; *Howard v. Shepard*, 9 M. Gr. & S. 296; *Tyndale v. Taylor*, 4 Ellis & Bl. 219; *Colgate v. Penn. Co.*, 102 N. Y. 120.) The law exacts of the carrier absolutely that the person to whom the delivery is made is the party rightfully entitled to the

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goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned. (Hutchinson on Carriers, § 344.)

George H. Adams for respondent. By the terms of the bill of lading the consignees, Zucca Brothers, were the presumptive owners of the goods, and the delivery of the goods by the defendant to Zucca Brothers released and discharged it from any further obligations on account of the bill of lading. (Hutch. on Car. 101; *Sweet v. Barney*, 33 N. Y. 335, 337; *Green v. Clark*, 13 Barb. 57, 62; *Lawrence v. Minturn*, 17 How. [U. S.], 100.)

PECKHAM, J. The following facts were proved or agreed upon on the trial: On the 25th of February, 1880, the assignors of the plaintiff, being partners, did, at the city of Norfolk, Virginia, deliver to the Baltimore Steam Packet Company, for shipment to Denver, Colorado, 10,460 pounds of peanuts contained in 100 bags and marked "Y", and that company then delivered to plaintiffs a receipt therefor, of which the material part is as follows:

"The Baltimore Steam Packet Company, R. L. Spoor, General Freight Agent, Baltimore Steam Packet Company.

"NORFOLK, *February 25, 1880*

"Received of Weller & Co. one hundred (100) bags peanuts.

"Weight, 10,460 lbs. Shipper's weight.

"Frt. to Denver, Col., \$3.14 per 100 lbs., marked Y—order notify Zucca Bros. to be transported to Denver, Col., he or they paying freight for the same, etc."

In the course of transportation to Denver, the peanuts were transported to the Missouri State line, where they were received by the defendant, a duly incorporated railroad company, on the 6th day of March, 1880. It did not receive any bill of lading, or copy thereof, with the peanuts from the preceding carrier, but it received them from a railway corporation known as the Hannibal and St. Joseph Railroad Company, and for the purpose of transporting said goods over

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the line of defendant's railroad to their destination at Denver; at the same time, and, together with the delivery of the goods to the defendant by the Hannibal and St. Joseph Railroad Company, the latter company delivered to the defendant a paper writing, known as a transfer sheet, of which the following is a copy:

"HANNIBAL AND ST. JOSEPH TRANSFER SHEET,
K's CITY, 3/6, 1880.

Consignee "Y," order Hup, Zucca Bros.,

Denver Col.

8. No. 662. From Chic. Date 3/4 W. B. 1,205, car 2,803.
100 bags P'nuts.

	Weight.	Charges.
All single sacks, good many with holes in, etc., wasting.....	10,460	\$63 81
Back charges		82 63
		<hr/> \$146 44

Consignor, Union Line,
Balt."

A way bill or manifest was made by the agents of defendant at the forwarding station of defendant and sent to the receiving station, either by mail or accompanying the freight; it is usually made up either from the shipping bills furnished by the shipper, when shipments originate at points on the Union Pacific Railway, or from transfer sheets, when freight is received from connecting lines. The way bill made up and relating to this particular matter, together with entries relating to other shipments, is as follows, viz:

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KANSAS PACIFIC RAILWAY FREIGHT MANIFEST, FROM ST. LINE TO DENVER, 187 Mch. 9.										
2 No. of Car.										
3	Initial.	1743	Consignee and Destination.	No. of packages.	Description of articles.	Separate weights.	Aggregate freight.	Rate Prepaid.	glt Collectible. Freight charges. Total.	Received the property against our respective names.
4	Consignor	662	* * *	*	*	*	*	*	*	
5	" Y " order Hup.									
6	Zucca Bros.		Den 100 Bags P Nuts				10280		30460 146 44355.61	
7			Holes in some—cts. wasting							
8			* *	*	*	*	*	*	*	
9				*	*	*	*	*	*	

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Excepting the transfer sheet the defendant received from the Hannibal and St. Joseph Railroad Company no writing or bill of lading or notification as to the ownership or disposition of the goods. The peanuts were delivered to Zucca Brothers, upon their order, without the production or surrender of the bill of lading for the same, and subsequently Weller & Co. demanded them of defendant, or their value, and defendant declined to deliver them or to pay their value.

The defendant at no time prior to the delivery of the goods to Zucca Brothers had actual notice of the delivery of the receipt to Weller & Co., at Norfolk, or of the contents of said receipt, or that the said receipt was held or possessed by any one, and at no time prior to such delivery had it actual notice or knowledge of any right or interest or ownership in the goods, or of their intended disposition, other than as they were notified or had knowledge from the transfer sheet received from the Hannibal and St. Joseph Railroad Company.

The parties also stipulated, as facts in the case, that immediately upon the shipment of the merchandise by the firm of Weller & Co. they drew a draft upon Zucca Brothers for the value of the shipment, and attached the same to the receipt or bill of lading indorsed by Weller & Co., as security for the same. Weller & Co. then procured the draft to be discounted in Norfolk, and, with the bill of lading attached, it was forwarded by the bank in Norfolk to their correspondent in Denver for collection. It was not paid, and thereupon Weller & Co. repaid the amount thereof to the bank, and received it and the bill of lading back.

It was also stipulated that no evidence was offered tending to prove that the defendant or the original or any carrier of the merchandise had any knowledge or notice of the transactions of Weller & Co. in relation to the draft, its discount or the disposition made by them of the receipt or bill of lading, or any of the facts in relation to the bill of lading hereinbefore set forth under the stipulation.

The plaintiff, as assignee, brought this action to recover of

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the defendant the value of the peanuts as for a conversion thereof, upon the theory that defendant had made an illegal delivery of the goods to Zucca Brothers without the production of the bill of lading. He recovered at the Circuit but the judgment was reversed at the General Term, and a new trial ordered, and the plaintiff appealed from that order to this court.

The question to be decided here depends upon what are the duties of a common carrier regarding the delivery of goods which he has undertaken to transport; and, also, what is the proper construction of the bill of lading.

It has been stated that too great caution cannot be exercised by the carrier in respect to the right of the person to whom delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself, and when there is any doubt, and it can be determined by documentary evidence, its production should be required. (Hutchinson on Carriers, 130; Angell on Carriers [5th ed.], 324.) Bills of lading are now quite as universally issued by carriers by land as by water. In this case the first carrier was by water, and such carrier did actually issue a bill of lading, a copy of the material portion of which has already been given. And it has been stated too that it is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so, he should retain the property until demanded by one claiming under that title. (*City Bank v. R., W. & O. R. R. Co.*, 44 N. Y. 136; *Howard v. Shepard*, C. B. 9 M. Gr. & Scott, 297; *Tindall v. Taylor*, 4 El. & Bl. 219.)

This defendant received from its immediate predecessor goods marked "Y" Denver, Colorado. The address upon the goods themselves, therefore, gave no notice as to whom the consignee was. There was a mere mark of identification upon them, together with a statement of their destination as Denver, Colorado. Something further was necessary in order to determine to whom delivery should be made. The only

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other source of information then in the possession of the defendant at Denver was the transfer sheet which it had received from the preceding carrier, which contained the statement above quoted. By the transfer sheet it was stated "Consignee 'Y,' order Hup. Zucca Bros., Denver, Col." The word "notify" in the original bill of lading had become "Hup." in the transfer sheet. Whose fault it was does not appear, but, from facts in the case, it can be said that it was not that of the defendant, nor of the plaintiff's assignors, for it occurred before the goods came to the defendant, and it was in papers which plaintiff's assignors had nothing to do with. It may be noticed, however, that in defendant's way-bill, which was made from the transfer sheet in the column headed "Consignee and Destination," no consignee is mentioned. It is simply "Den. 100 bags P. Nuts. Holes in same, cts. wasting." This is some evidence that it did not regard Zucca Brothers under the language of the transfer sheet as really the consignees. Its way-bill was made up from the transfer sheet, and it evidently was supposed by the person who made it up that, at least, the language of the transfer sheet was too blind to show, beyond doubt, that Zucca Brothers were such consignees. The information which the defendant procured, therefore, as to the consignee, was of a doubtful nature, so far as the transfer sheet was concerned. Being thus doubtful, it would seem a most negligent act to deliver the goods to persons named in that transfer sheet who did not plainly appear to be the consignees. Under such circumstances it would seem that a delivery should be at the peril of the carrier. He could protect himself perfectly well by refusing to deliver until a bill of lading should be presented and delivery made in accordance therewith.

If there were no bill of lading, inquiry would develop that fact, and in all probability would also show who was the proper party to whom to make delivery. Until this was done the goods could be properly placed in store, as was stated to be the true course in *Bank v. Bissell* (72 N. Y. 615). Our factors' act makes it the duty of a carrier, etc., not to deliver

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goods except upon production and cancellation of the bills of lading, and, for a delivery to a consignor without the production of the bill of lading, which provided for a delivery to him, but which he had in the meantime indorsed and negotiated, the carrier was held liable to the holder of the bill. (*Colgate v. Penn. Co.*, 102 N. Y. 120.)

If this delivery had been made in this State, therefore, there would have been no doubt of the propriety of the recovery in this action, assuming that Zucca Brothers were not the consignees. We think that the common law makes it the duty of the carrier to deliver in accordance with the bill of lading, and if delivered without it the carrier runs the risk of showing a delivery in accordance with its directions.

It is argued here that, even by the terms of the original bill of lading, Zucca Brothers were the consignees, and that being such they were presumptively the proper parties to whom to make delivery, and that there was no written, or any, notification to the contrary, and, hence, defendants were justified in such delivery.

We do not agree to the correctness of this construction of the bill of lading. It acknowledges the receipt of the goods, their weight, and states the amount of freight to their destination, Denver, Col., and says the goods are marked "Y— order, notify Zucca Bros."

Here is no statement that Zucca Brothers are the consignees. The very presence of the word *notify*, in its relation to them, shows that they are not intended as the consignees. If they were, the word is wholly unnecessary. It is the duty of the carrier to notify the consignee of the arrival of the goods. (*Price v. Powell*, 3 N. Y. 322.) To place in the bill of lading a direction to notify certain persons to whom, if consignees, it was the carrier's duty to deliver, or at least to notify of the arrival of the goods, is a plain notice that (in the absence of further directions) they are not the consignees.

In this bill no one is named as consignee, and that makes it obvious that no delivery should be made to any one who does not produce it. The words, "Y— order, notify Zucca

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Bros.," in the order in which they are written, show that the goods are not to be delivered to the order of Zucca Brothers, because after the word "order," in relation to Zucca Brothers, is the word "notify," which notification is all the duty the defendant had to perform under the bill. The word "order," therefore, must relate to what preceded, and it must have meant that delivery was to be made to the order of the consignors, or else to the order of "Y," which, being altogether fictitious, does not mean to the order of Zucca Brothers unless they produce the bill of lading. Zucca Brothers not being the consignees, therefore, all the cases showing that *prima facie* the consignee is the owner, and a delivery to him protects the carrier, unless he has been notified to the contrary, do not apply here.

The opinion of the learned judge at the General Term proceeds, as it seems to us, upon the erroneous theory that the defendant was only bound to know what was imparted to it by the directions on the goods and the papers it received from its immediate predecessor, and that from such papers it discharged its obligations by delivering to Zucca Brothers. Even on the papers received from the Hannibal and St. Joseph Railroad, we do not think the defendant was justified, without inquiry, in making the delivery, and we do not think that a carrier situated like defendant can safely rely upon the papers received from its immediate predecessor, when it delivers without a bill of lading (where one was made out) and to the wrong person, although justified in its delivery by the papers received from its predecessor, which differed, as to the consignee, from the person named in the bill. These papers are made out for the convenience of the carriers as between themselves. The owner or consignor of the goods has nothing to do with them, and probably never sees them. If he has placed a direction upon the property, showing where it is to be transported, and obtained a bill of lading for it, he has the right to assume that delivery will only be made in accordance with the terms of the bill, and the duty of the carrier is only thereby discharged.

Statement of case.

In this case, as Zucca Brothers were not consignees, etc., the whole loss was sustained by the negligence of the defendant in not demanding the bill of lading before delivering the property, which bill Zucca Brothers could not have produced unless they had paid the draft which accompanied it. By neglecting this plain duty, the defendant caused the loss, and by failing to deliver on plaintiff's demand it has converted the goods, and it should, therefore, be responsible for their value.

The order of the General Term reversing the judgment of the Circuit and granting a new trial should be reversed, and the judgment at Circuit affirmed, with costs.

All concur, except DANFORTH, J., not sitting.

Judgment reversed.

CHARLES S. ARCHER, Respondent, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, as a passenger on the road of the N. Y. & N. E. R. R. Co., came into the depot at Hartford, Conn., which depot was built and used in common by that company and the defendant. There were exits from the depot on the east and west sides. Plaintiff, who had never before been in Hartford, followed a number of other passengers out of the depot on to a platform running along its east side. One of defendant's tracks ran outside of the depot along near the platform, so close that its cars moving thereon overlapped the platform two or three inches and more according to the oscillations of the car. Cabmen were standing about ten feet from the platform, one of whom approached plaintiff and was engaged by him. He took part of plaintiff's baggage and proceeded to his cab a few feet distant, leaving plaintiff on the platform, when one of defendant's trains, moving at an unusually rapid rate upon the track, over which the cabman had just passed, struck plaintiff and inflicted the injury. It was a dark, hazy evening. Plaintiff did not know of the existence of the track and did not see it. Both he and the cabman testified that they did not see the train or know of its approach and heard no bell or whistle. *Held*, that the evidence justified a submission of the case to the jury and was sufficient to sustain a verdict for plaintiff; that he was entitled to a safe passage out of the depot and had a right to act upon the assumption

106	589
118	364
106	589
118	83
106	589
126	148
106	589
129	83

Statement of case.

that every necessary and reasonable precaution would be taken to make it safe; that he had a right to regard the platform as a safe and proper place; and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of outgoing and incoming passengers, and so near a platform provided for them as to sweep a portion of it, was negligence.

Defendant is a Connecticut corporation. Plaintiff was permitted, on the trial against defendant's exception, to read in evidence portions of the statutes of that State relating to the running of railroad trains, and the court refused to charge the jury that they were not to be influenced by said provisions. *Held*, no error.

Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident, and testified that it represented fairly the locality. On cross-examination he testified that he did not take it and did not know from what point it was taken. The reception of the photograph was objected to generally and objection overruled. *Held*, no error; that the photograph, if a fair representation, was admissible the same as a map or other diagram.

(Argued June 20, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 29, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

Henry H. Anderson for appellant. Defendant was bound to use every reasonable precaution, but not every possible one. (*Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 357; *Hayes v. Forty-second St., etc., R. R. Co.*, 97 id., 259; *Searles v. Man. R. R. Co.*, 101 id., 661; *Weber v. N. Y. C. R. R. Co.*, 58 id. 462.) Upon the theory of the plaintiff's counsel that the plaintiff was struck by an overhanging or overlapping car, he must not only have leaned over, but also remained in such position at the edge of the platform while the locomotive and tender were passing by him, and thus would be chargeable with the grossest negligence. (*Becht v. Corbin*, 92 N. Y. 658; *Adolph v. C. P., etc., R. R. Co.*, 76 id. 530; 32 Hun, 241.) The defendant was not guilty of negligence.

Statement of case.

(*Archer v. N. Y., N. H. & H. R. R. Co.*, 32 Hun, 241; *Wilcox v. R., W. & O. R. R. Co.*, 39 N. Y. 358.) Plaintiff should have kept himself and his parcels away from the edge of the platform. (*Dubois v. City of Kingston*, 102 N. Y. 219.) As this action was not based upon any alleged violation of section 73 of the Revised Statutes of the State of Connecticut, said section should not have been admitted in evidence. Under any circumstances it was immaterial, the tendency of its admission was to confuse the jury, and thereby injure the defendant. (*Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y., 468; *Steves v. O. & S. R. R. Co.*, 18 id. 422; *Byrne v. N. Y. C. & H. R. R. R. Co.*, 94 id. 12.) The court erred in refusing defendant's request to charge that "a person not a passenger of a railroad sought to be held liable in damages is bound before crossing a railroad track or entering or leaving a station to look up and down and listen for an arriving train. If he fails to do so he must suffer the consequences, if he knew the track was there." (*Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 241; *Archer v. N. Y., N. H. & H. R. R. Co.*, 32 Hun, 24.) The court also erred in refusing defendant's request to charge that "if defendant's train, while proceeding along the Hartford station platform, was equipped with a head-light, and the bell of the engine was kept sounding, this was sufficient to apprise the plaintiff of the approach of the train." (*Culhane v. N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 133.)

Dennis McMahon for respondent. If the requirement of the Connecticut statute had been complied with, viz., to commence ringing eighty rods below the street the train was about to cross, and such ringing had been kept up as required by said statute, it is fair to infer that plaintiff and his cabman would have heard it. (*McCallum v. L. I. R. R. Co.*, 38 Hun, 569; 101 N. Y. 419.) The plaintiff was guilty of no contributory negligence. (*Harvey v. N. Y. & W. R. R. Co.*, 21 Week. Dig. 198; *Glushing v. Sharp*, 96 N. Y. 677.) The trial judge erred in holding as matter of law that plaintiff

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was, under the circumstances, guilty of contributory negligence. (*Greany v. L. I. R. R. Co.*, 101 N. Y. 423; *Williams v. D. & L. R. R. Co.*, 39 Hun, 430; *Raube v. N. Y. O. & W. R. R. Co.*, 102 N. Y. 721; *Vanderwold v. Olsen*, 1 id. 506; *Dobiecke v. Sharp*, 88 id. 208, 210; *Brassell v. R. Co.*, 84 id. 241; *Weston v. N. Y. C. R. R. Co.*, 73 id. 595; 75 id. 323; *McGuire v. Spence*, 91 id. 303; *Shaw v. Jewett*, 86 id. 617.) If plaintiff was hurt while crossing the track eastward he was not guilty of negligence, because he was prosecuting his journey to the place to which he was going. He had the right to cross the track. (84 N. Y. 246; *Voak v. N. C. R. R. Co.*, 75 id. 323.) The learned judge below properly admitted the reading in evidence of the seventy-third section of the Connecticut statute. (*Hunt v. Johnson*, 44 N. Y. 27; *Briggs v. N. Y. C. R. R. Co.*, 72 id. 26; *Knupfle v. Knick. Ice Co.*, 12 Week. Dig. 67; *McGrath v. N. Y. C. R. R. Co.*, 63 N. Y. 522; *Dyer v. E. R. Co.*, 71 id. 228; *Zimmer v. N. Y. C. R. R. Co.*, 67 id. 601; *Brassell v. N. Y. C. R. R. Co.*, 84 id. 241; *Terry v. Jewett*, 78 id. 338.) The photograph, which Mr. Archer testified fairly described the locality, was properly received in evidence. (*Arthur v. Roberts*, 60 Barb. 580; *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 451; *Ruloff Case*, 11 Abb. P. R. [N. S.] 245, 309; 45 N. Y. 213; *Cowley v. People*, 83 id. 464, 476; *People v. Buddensieck*, 4 N. Y. Cr. R. 230; *Curtiss v. Ayrault*, 3 Hun, 487; *Johnston v. Jones*, 1 Black. U. S. S. C. 216.) There was no error in the judge's charge or in his refusals of requests to charge. (*Dobiecke v. Sharp*, 88 N. Y. 207, 208, 210; *Brassell v. Railway Co.*, 84 id. 241; *Western v. N. Y. C. R. R. Co.*, 73 id. 595; *McGuire v. Spence*, 91 id. 303; *Glushing v. Sharp*, 96 id. 677; *Shaw v. Jewett*, 86 id. 617; *Caldwell v. N. J. St. Bt. Co.*, 47 id. 282; *Roth v. Wells*, 29 id. 492; *Williams v. Earle*, 44 id. 171; *Brett v. Catlin*, 47 Barb. 404.)

DANFORTH, J. The action was brought to recover damages for injuries sustained, by reason of the defendant's negligence

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in the management of its train, at a place known as the Union Depot, in the city of Hartford. The plaintiff, as a passenger, was brought in to the station over another line (the N. Y. & N. E. R. R.), which, as well as the defendant, had the right to use and enjoy it for the receipt and delivery of passengers, and no claim is made that he was not lawfully there. Nor is it denied that he was hit and severely wounded by an incoming train of the defendant. His right hand was so crushed that amputation above the wrist was necessary, his skull and scalp severely injured, the scalp so cut and torn from the parietal bone, on the right side of the skull, that it was entirely bare. There was also a fracture at that point. On the right side of the back part of the head was a compound comminuted fracture of the skull, and there were also bruises on the face. Such were the injuries as described by the surgeon. A hand-bag, also, which the plaintiff was carrying in his right hand, was at the same time injured. As to these matters there was no controversy, and it stands as a fact in the case that each injury was upon the right side, and upon the upper part of the person, and none elsewhere.

The contention was against the plaintiff's claim as set forth in the complaint, and in proof of which evidence was given, viz.: That after disembarking from his train, and while standing upon the platform and preparing to leave, "he was run against and knocked off the platform, and run over " by the defendant's train coming from the south over a track laid just east, and outside of the platform. He had never before been in Hartford, and, as the complaint alleges and as he proved, "was totally ignorant that there was any such track," or of the approach of the defendant's train; and one point of his accusation was that no preliminary warning was given to him in that behalf; that it was dark; that the train came up unseen by him, without notice of its approach, by bell or whistle, or other signal, at an improper rate of speed, under the circumstances, and "greater than the law permitted; that on his part, he, with proper care was upon the platform in the course of exit from the station, to go to his destination in

the city. At the close of the plaintiff's evidence, the learned counsel for the defendant moved for a dismissal of the complaint upon the ground, first, "that there is no evidence in the case of any negligence on the part of the defendant;" and, second, "that the plaintiff has not affirmatively proved himself free from fault." This being denied the defendant gave evidence tending to show diligence and care on its part, and as it claimed lack of care and prudence on the plaintiff's part, to the effect that the plaintiff left the platform, crossed this track, which lay to the east and got entirely over it, and then, turned and attempted to recross the track to the platform, and while so doing he was struck by some portion of the front part of the engine, and thrown up; that he fell between the train and the platform, and that the injuries which he sustained were received in this way.

The learned counsel for the defendant then repeated the motion above referred to; it was denied, and he moved the trial court to direct a verdict for the defendant. This, also, was denied. In submitting the case to the jury the learned trial judge presented the facts and the evidence at the foundation of the claims of the respective parties, and the principles of law applicable thereto, in a manner so comprehensive and fair that, so far as it concerned the conduct and duty of the respective parties, no exception was taken by either. The defendant's complaint is that he did not say more. Numerous requests were made by its counsel for instructions to the jury, and refused, but, of the exceptions then taken, only a few are now insisted upon. Other questions arise upon evidence. But the first and principal contention upon this appeal is, that the learned trial judge erred in not taking the facts away from the jury and declaring, as matter of law, that the plaintiff was not entitled to recover.

In an action for negligence the burden of proof is upon the plaintiff to show that the injury complained of was caused by the defendant, not in part, but solely, and so the courts hold that the person injured must not, by his own negligence, have contributed to the injury. What was the plaintiff's conduct

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at this time? He was brought into the depot by one of its owners; he was entitled to a safe passage out of it so that he could continue his journey to the place of destination, and he had a right to act upon the assumption that every necessary and reasonable precaution would be taken by its proprietors to make it so. He was discharged in the station and left to find his way out. The same roof covered the tracks and offices of the road he traveled and the tracks and offices of the defendant's road. The depot was built at one time and with reference to its being used by both companies; cross-walks were provided for the convenience of passengers arriving or leaving on either road, and passengers to and from the New England road were in the habit of crossing to the east side as the plaintiff did. He might alight from his train on either side, and from either side go directly from the enclosure. He was not told to go one way rather than the other; both were open to him; he saw no one to direct him and he followed a crowd of others, ten or fifteen in number, in the way they went. Neither way seemed appropriated to a particular road, and, in fact, it was not. The business part of Hartford was east of the depot, and so were the principal hotels and Main street. Cab stands were on each side, and whether the principal one was on the east side was in dispute. The plaintiff's intention was to go to the business part of the city, and he left the cars and crossed to the east platform to get a cab. Arriving at the platform he saw and heard cabmen standing some ten feet from the platform and calling aloud. He carried with him two valises, one a sample case, large and of considerable weight; this he placed near the outer edge of the platform, holding the other in his right hand. The rules of the depot prohibited cabmen from going on the platform. One approached and was engaged; he took up the large sample case, turned round and went toward his cab, leaving the plaintiff standing on the platform and facing the east. The cabman had but a few steps to go, and he placed the bag in his cab; "probably," he says, about a second elapsed between the time of the taking of the bag and placing it in his cab.

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As he opened the cab door and put it in he turned and the train went by him, over the narrow space he had just traversed, and between himself and the platform. The cabman had not before seen the train and did not know of its approach; he heard no bell or whistle; it was dark, slightly misty, not raining, "a kind of hazy evening." The cabman was familiar with the running of trains; for two years he had been in the habit of going to the same place, and, he says, "the train came in pretty fast, probably going, may be, ten or twelve miles an hour." He shut the carriage door, got on the box "and drove to the tail end of the train." "I went," he says, "to look for the gentleman;" he saw a crowd of people on the platform surrounding the body of the plaintiff. It appears that a track of the defendant ran on a curve along by the platform, its inner or west rail two feet or two feet six inches from the outside edge of the platform, and when the train had passed the body of the plaintiff was found lying in this space, injured in the manner above described. The evidence was positive, and came from both sides, that the cars of the defendant were so constructed that at this curve they overlapped the platform two or three inches and more according to the oscillations of the car. There was generally an oscillation both ways, a vibration moving backward and forward. In coming from the south, as was the train in question, the cars project over the platform the whole length of the curve, and that took in the platform from the end of the depot south, and included, as the evidence tended to show, the place of injury, the spot where the plaintiff was standing. His evidence is positive that he never left the platform of his own volition; that he was standing there when hurt. He did not see the train approach; heard no signal; did not even know or see there was a track for that train, but he was struck by it and wounded. Upon this evidence it cannot be doubted that his injury was the result of the negligence of the defendant. His story cannot be rejected as an improbable one. He was a stranger, on the spot for the first time; the night was dark, his attention drawn to the cabman and his destination. He had no reason

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to suppose the place was one of danger; it was outside the building; he saw no track; had just left the enclosed passenger station and did not anticipate the events which followed. He might instinctively regard a platform erected for passengers to be a safe and proper place for him. (*Hazman v. Hoboken L. & I. Co.* 50 N. Y. 60.) The conduct of the cabman also furnishes strong corroboration of the plaintiff. He knew of the existence of the track and its use, but within a second before the train ran upon the plaintiff he was standing before him, ignorant of its coming, negotiating for a fare and knew nothing of the impending danger until it passed. So the position and character of the injuries favor the plaintiff's version of the transaction. All were on the side exposed to the approaching train, and were of a character to be accounted for by such collision and the place where he was found, between the inner rail and the platform. If this evidence be true, the jury were at least authorized to find that the injury was occasioned solely by the defendant's negligence. To bring, without notice, a train at such speed up to a station, into the neighborhood even of incoming or outgoing passengers, would seem inexcusable; but when the cars brought up are so constructed as to overlap some portion of the platform provided for those passengers, a delinquency on its part is established of such a character as to prove *prima facie* the whole issue. If those circumstances were truly stated, the defendant failed to do the thing which it should have done, and did that which it should not have done. It was guilty of negligence in respect of running its train; and in respect to the construction of its platform and its car it was an actual wrong-doer, and the result attributed to it of loss and damage to a person situated as the plaintiff lawfully was might reasonably have been expected. The trial judge, therefore, did not err when, with evidence of these things before him, he refused to dismiss the complaint, for if the plaintiff not only neither saw nor heard a moving train, but was even ignorant of a track provided for it, he could not be chargeable

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in law with negligence in assuming there was nothing to make his position dangerous.

The defendant's case presents a different theory. Its counsel argues that the plaintiff was careless in the manner of leaving the train by which he was brought into the depot, careless in going to and standing upon the platform; and more than that, if the extreme statements of the defendant's witnesses are to be credited, he was foolhardy and suicidal in leaving the platform in face of the approaching train, with its head-light blazing upon the track and its bell filling his ears with notice of danger. Nor can I say that there is no evidence from the defendant which, in some aspect, does not justify these inferences. It is at variance with that of the plaintiff, irreconcilably so. The defendant's witnesses are also at variance with each other, and their statements, as to certain material points, contradictory to the last degree. They agree, however, in this, that the head lamp was lighted, that the whistle sounded at the proper distance, and that on entering the station the bell was rung. The speed of the engine is put by them variously at four, five, six and eight miles an hour, as matter of opinion; but upon the main point raised by the defense, whether the plaintiff was on the track at the time of the injury, and not, as he claimed, on the platform, the difference between them is very great. The engineer of the train states that the head-lamp was lighted and so illuminated the track before it that if a man had been upon it he could have been seen at a distance of 300 feet. The engineer was on the right hand, that is, on the east side of the engine, looking ahead as he drew into the station, but did not see Mr. Archer that night. He saw no one in front of his engine, no one on the track, and knew nothing of the accident at the time it occurred. He was afterwards informed of it. The defendant's superintendent of motive power was at the station by the baggage-room; he heard the whistle and the bell. The engine was new, and he was watching its motion; "it labored exceedingly and moved very slowly coming into the station." While the train was in motion and had not wholly

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passed the plaintiff, the witness saw him lying on his back between the west rail and the platform, next to the platform, his head toward the south. He went to him; the train had not stopped; his hand was then on the rail; the wheel took off the little finger and the one next to it. The witness reached down and put his hand upon plaintiff's heart, "so as to keep him from injuring himself further."

So far, the evidence is not inconsistent with the plaintiff's case. It certainly has no tendency to show that he was not knocked off the platform by the overhanging car. He was not seen upon the track by the engineer, although the latter was in position to see him if there, and, in the performance of his duty, was intent on discovering intruders or other objects in his way. The master mechanic, in all probability, would have seen him if upon the track and in the way of the locomotive. He did not, but following the rush of people he found the plaintiff where he naturally would have been had he, at the very moment, been swept off. Even when the train stopped, one or more of the cars had not passed him. The fireman was on the left or west side of the cab, looking out of the window. He did not see Mr. Archer or know of the accident until after the train had stopped. Other evidence was from one Downs, a teamster. He was at the station and saw Mr. Archer before he was injured, standing on the platform and talking to a hackman. He heard the bargain made and at once stepped to the middle of the track, and from there to his horses, just outside the track. He did not see the plaintiff leave the platform, and next heard some one say a man was killed. This evidence also has some tendency to corroborate and strengthen the plaintiff's case, and, as the witness was near at hand, with his attention called to the train as it approached, presented the question whether, if the plaintiff had left the platform of his own will, he must not have seen him. Goff, a hackman, also called for the defendant, was on the east side of the east track, outside the depot, ten or twenty feet from the incoming train. He says: "I saw him (Archer) fall; my first impression was that he fell

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from the engine, and when he fell he fell between the west rail and the platform; he fell lengthwise, pretty close to the platform." Or, as he put it again: "When I first saw him he was falling alongside the engine, on the side next the platform." The evidence of what he saw might be regarded as consistent with a fall from the platform as from the engine. He says again: "The first sight I had of the man, to my remembrance, was seeing him fall." The remaining witnesses for the defendant, if believed, leave nothing to be inferred as to whether the plaintiff suffered from the negligence of the defendant or his own voluntary act. They testify that the plaintiff left the platform, crossed the track to the east, and, after some delay, undertook to recross the track to the platform, and in the middle of his course back, and while on the track, was struck by the engine and thrown into the place where he was soon found. There were, however, many discrepancies in their testimony, some circumstances affecting their credibility, others of contradiction, and, upon the whole, an account which a trial court was not bound to accept as absolutely true. It could not be reconciled with the plaintiff's testimony or that of his witnesses, or with that of the engineer. It might be thought wholly at variance with the circumstances or fixed facts concerning which there was no controversy. The interval between the plaintiff's arrival at the depot and the coming in of the train was brief; the object of the plaintiff was to leave; his cabman had been secured; and if it could be urged that he might cross the track on his way out, no reason is, or can be assigned from the evidence, why, if he was once over it, he should desire to return to the platform. According to the defendant's evidence, the plaintiff was struck while in the middle of the track by the cow-catcher with such force and so directly that, as one witness says "he was thrown up in the air six to eight feet, as high as the top of the boiler." If such evidence could be reconciled with that of the engineer for instance — who, although looking, saw no one upon the track — or that of the master mechanic — who watched the approaching engine with a maker's curiosity as it came from

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a point beyond the place of injury, and who must have seen the open track, but did not see the plaintiff, or with the condition of the body, which exhibited no wounds on the lower part of the person, or with the evidence of another witness of the defendant, its employe, who testified that he saw the plaintiff leave the platform, cross the track, and returning to the platform 'place one foot upon it,' only to be struck by the end of the crossbar of the engine and 'turned round' so that he went down between the wheels and the platform," and who being asked whether he "saw him caught by the cow-catcher and thrown in the air, answered 'no sir; if he was he would be killed sure;'" the questions arising on this and other evidence were for the jury. It was their duty to balance the probabilities and determine which side had the preponderance. They were to determine the credibility of the witnesses and say which version should be taken. Neither side lacked apparent corroboration. The plaintiff's case, if unaffected by opposing circumstances and testimony, was made out. How far it was so affected was for the jury. The defense was not decisive. It rested wholly upon witnesses whose testimony was liable to be discredited, not only by inferences to be drawn from uncontroverted facts — and those inferences were for the jury to draw — but by circumstances in evidence which it was the province of the jury to weigh and determine, and also by contradictions and discrepancies in their own statements, which the jury alone could reconcile, choose from or reject, and in doing this, consider the bearing and deportment of the witnesses, from which important aid in arriving at the truth is not infrequently obtained.

Two juries have agreed; two General Terms have been asked to review the facts; the first granted a new trial only for misdirection by the trial judge, the second affirmed the judgment which followed the new trial and affirmed the order of the trial judge, which denied a third. It is not for this court to decide whether the evidence was weighed as it would weigh it, nor whether it would have reached the same conclusion as that expressed by the verdict. The court which

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heard it, and the court whose jurisdiction permits an inquiry upon the facts, are far better qualified to pass upon the credit and weight to be given to it than we could be. It is enough for us that there was sufficient evidence to present a case with two sides, and consequently sufficient for the jury to pass upon, and we see no reason to suppose they were not guided in their decision by a conscientious judgment and belief fairly formed in view of all the circumstances of the case. Nor do we find that the learned trial judge erred to the defendant's prejudice in the conduct of the trial. Exceptions were numerous, but those now insisted upon are few.

First. The injuries were inflicted by a company organized under the laws of Connecticut, and, therefore, subject to them. So much is admitted by the pleadings. In the course of the trial the plaintiff was permitted, against the exception of the defendant, to read in evidence portions of the statutes of that State, which relate to the running of railroad trains, stating at the time that he offered them as bearing upon the issue as to defendant's negligence. The objections were that, under the pleadings, the evidence was inadmissible, immaterial and irrelevant. The court, in its charge, made no allusion to those statutes, but defined the ground of defendant's liability, if any, and its duties in a manner satisfactory to the defendant's counsel, and was then asked by him to charge "that the jury, in considering the case, must not be influenced by section 73 of the Revised Statutes of Connecticut, which has been read in their hearing," and so in regard to sections 78 and 57. Section 73 related to the ringing of a bell on approaching a crossing and was proper and, in one view, important for consideration; the others related also to the running of trains, and, though less important, were not irrelevant upon the question of negligence. It is quite impossible the defendant could have been prejudiced even without the qualification made by the judge when requested by plaintiff's counsel to charge that "if the jury should find that there were switches south of the depot and south of Asylum street, and that by the laws of the State of Connecticut, section 78 of the Revised

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Statutes, a switchman was required to be stationed at night with a light at or near the switch, and the jury should further find that the absence of such switchman with a light contributed to the accident, then the defendants are guilty of negligence;" he said, "I decline to charge as requested, but I will submit to the jury the several facts set forth in the request for their consideration as to whether the company did exercise reasonable care and prudence in running the train." The point was presented in each instance whether the act or default of defendant contributed to the injury.

Second. The plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident. The appellant alleges error in its admission. Upon the trial this occurred: The plaintiff, being on the witness stand, was asked to look at the photograph and "see if that describes fairly the locality?" Before answering he was questioned by defendant's counsel, and said: "This was not made by me: I don't know from what point it was taken; I don't know to what point, as a focus, this instrument was directed. (Objected to by defendant's counsel; objection overruled, and defendant's counsel excepted.) A. Yes, sir."

The proposition now submitted by the appellant to show error is, that "there was not sufficient proof of the point from, or the time at, which the photograph was taken to entitle it to be submitted to the jury as a picture of the premises as they existed at the time of the accident." The objection at the trial was a general one and within our decision in the *Cowley Case* (83 N. Y. 464, 476), unavailing. If a fair representation of the premises, it was admissible as an aid in the investigation, as much so as a map or other diagram, and served in like manner to explain or illustrate and apply testimony. Such drawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence. (*People v. Buddensieck*, 103 N. Y. 487, 501.) Of course, its value, like the value of other evidence, depends upon its accuracy. There was some evidence of this and the witness

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was not contradicted. No other exception appears to require notice and it only remains to affirm the judgment as one against which no error in law has been assigned. It is, therefore, affirmed.

All concur, except EARL, J., not voting.

Judgment affirmed.

THE PEOPLE ex rel. ELIZABETH VAN RIPER, Respondent, v.
THE NEW YORK CATHOLIC PROTECTORY, Appellant.

To warrant an arrest under the section of the Penal Code (§ 291, subd. 2), directing the arrest of a female child "who has been abandoned or improperly exposed or neglected by its parents or other person having it in charge," it must appear that the child was abandoned and neglected by the fault of her parents or custodians.

In proceedings on writs of *habeas corpus* and *certiorari* it appeared that a female child was committed to the custody of defendant for an assumed violation of said provision. The only evidence in the record, of the proceedings before the justice, was the complaint and the commitment; in the former she was charged with having been found "improperly exposed and neglected and wandering" in a public park "without any proper guardianship," and the commitment recited that the material allegations of the complaint were established. *Held*, that the complaint did not bring the case within the said provision, as it was not alleged that she was so exposed by those having her in charge.

The information in such a case should be precise and bring it clearly within the statute; when it omits any essential ingredient or circumstance, and the defect is not supplied by the evidence, the conviction is bad.

The complaint also charged "that the said child was found in the company of * * * who is a reputed prostitute," in violation of the provisions of the Penal Code. The return to the writs simply averred its incorporation, and that, by virtue of defendant's charter and section 292 of the Penal Code, the child was committed to its custody under a commitment, a copy of which was annexed, which recited that the conviction proceeded upon proof of the charge made. The relator traversed the return, alleging, in substance, that the child had done no act prohibited by the Penal Code, but was in the park at the time charged for an innocent and lawful purpose, and having parents with whom she resided. Defendant demurred to this traverse. *Held*, that

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the complaint followed substantially the language of the fourth subdivision of said section and was sufficient as matter of pleading; that the averments in the traverse admitted by the demurrer might show that the child was wrongfully convicted, but it could not be inferred therefrom that there was no evidence before the magistrate justifying the conviction; and that a retrial upon the merits could not be had in these proceedings.

A summary conviction may not be set aside on *habeas corpus* or *certiorari* on averments and proof that the fact proved before the magistrate, on which the conviction depended, was not true.

It was admitted that no notice of the proceedings before the magistrate was given to the father of the child, with whom she resided, and that he was not present at the examination. The relator, her mother, was present. *Held*, that by reason of the omission of notice to the father the magistrate proceeded without jurisdiction; also, the fact that the father is not the relator and does not make the application for the discharge did not affect the question.

Under the provision of said section, as amended in 1886 (Chap. 81, Laws of 1886), declaring that when it shall appear by the warrant of commitment that "the parent, guardian or custodian" was present at the examination before the magistrate or had such notice thereof as the magistrate shall deem sufficient, no further or other notice shall be necessary, where both parents are living the notice must be to, or the appearance by the father.

The court below, on granting or affirming an order of discharge in such proceedings, has no authority to allow costs.

(Argued June 21, 1887; decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 13, 1887, which affirmed an order of Special Term discharging, on *habeas corpus* or *certiorari*, Florence Van Ripper from commitment. (Reported below *sub nomine*, *People ex rel. v. House of Good Shepard*, 44 Hun, 526.)

The material facts are stated in the opinion.

Elbridge T. Gerry for appellant. The relator had her day in court and is estopped by the judgment of the magistrate. (*In re Moses*, 13 Abb. N. C. 189; *People v. Superintendent, etc.*, 8 Abb. Pr. [N. S.], 112; *People v. Keeper, etc.*, 37 How. Pr. 494; *In re Roach*, 18 W. Dig. 514.) The notice to be served upon the parents of children committed to the appellant is governed by the provisions of the special act consti-

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tuting the charter of the institution. (Laws of 1863, chap. 448; Consolidation Act, § 1612 *et seq.*, as considered in connection with § 291 of the Penal Code, as amended by chap. 31 of the Laws of 1886.) Even if under this special act notice to both father and mother, if residents of the city, is necessary, under the Penal Code as amended in 1886, such notice is unnecessary, where either parent is present at the examination or has such other notice as the magistrate deems sufficient. (*People ex rel. Van Heck v. N. Y. Catholic Protectory*, 38 Hun, 127; 101 N. Y. 195.) The Special Term had no right to go behind the conviction and retry the question of fact upon which it was made, if such issue had been raised. (38 Hun, 127; *People ex rel. Perkerson v. S. of St. Dom.*, 34 id. 463; *Matter of Moses*, 13 Abb. N. C. 189.) It is not necessary in commitments of this character to recite the particular act of vagrancy. The commitment need not state all the particulars necessary to make out the offense. (*In re Gray*, 11 Abb. Pr. 56; *People v. Moore*, 3 Park. Cr. 465; *People v. Degnau*, 6 Abb. Pr. [N. S.], 87; *In re Hogan*, 55 How. Pr. 458; *In re Moses*, 13 Abb. N. C. 189; *In re Nichols*, 4 N. Y. 659; *Hiscocks v. Jermonson*, 52 L. J. [N. S.], 43.) Where a conviction is drawn in question collaterally upon *habeas corpus* it has always been the rule that the commitment should be so construed as to sustain the conviction if possible. (*People v. Maschke*, 2 N. Y. Cr. R. 168.) When, upon the return of the writ, it is a conceded fact that the child was held under a final judgment of a court of competent jurisdiction, it is the imperative duty of the court to remand the child under the *habeas corpus* act without further inquiry. (Code of Civ. Pro. § 2032; *People ex rel. Perkerson v. S. of St. Dom.*, 34 Hun, 463.) The section of the Code under which the commitment was made is remedial in its nature, not punitive; and it should be so construed as to give effect to the humane objects which it seeks to accomplish. (*In re Haller*, 12 Hun, 131; *In re Forbes*, 4 Park. Cr. R. 611; *In re Donahue*, 1 Abb. N. C. 1.) The right of the protec-

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tory to place the child in the House of the Good Shepherd was incidental to its guardianship, and was properly exercised. (*In re Julia Moffit*, Daily Reg., May 4, 1886.) This being a criminal proceeding, and not a special proceeding as defined by the Code of Civil Procedure, the General Term has no authority to impose costs.

Dennis McMahon for respondent. There is no statutory authority for a transfer by the Catholic Protectory of any of its inmates committed to it to any other institution, but the Catholic Protectory is authorized to return a person committed to its care, or discharge such person. (Cons. Act, §§ 1623, 1624; 2 Laws of 1882, 399.) The New York Juvenile Asylum has such power (§ 1616). The fact that the commitment recites that the notice was given to the mother, and that she was present, is not complying with the statute. The father should have had notice. (*Bartley v. Recklenger*, 4 N. Y. 38; *Combs v. Jackson*, 2 Wend. 153; *Fonde v. Van Hoone*, 15 id. 631; *People v. Nickerson*, 19 id. 16; *Abrenfeldt v. Abrenfeldt*, Hoffman, 497; *People v. Humphreys*, 24 Barb. 521; *People ex rel. Van Heck v. N. Y. C. Protectory*, 101 N. Y. 195.) The office of a *certiorari* is to bring up a record of the proceedings of an inferior court or tribunal, to enable the reviewing court to decide whether it had acted within its jurisdiction. (*People v. Betts*, 55 N. Y. 600; *People v. Assessors*, 39 id. 81; Code, §§ 2140, 2044, 2039, 2042.)

ANDREWS, J. Florence Van Riper, a child of the age of fourteen years, was on the 5th day of October, 1886, brought before a police justice in the city of New York, charged with having been found on that day "improperly exposed and neglected and wandering in the public park, to wit, the Union Square Park in said city, without any proper guardianship; that the said child was found in the company of one Mary Ryan, who is a reputed prostitute, in violation of the provisions of the Penal Code." The justice on the same day examined the charge, and, after hearing the wit-

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nesses, adjudicated that the charges set forth in the complaint were true, and thereupon issued a commitment committing the said Florence Van Riper to the New York Catholic Protectory, "to be and remain under the guardianship of said corporation until therefrom discharged pursuant to law." Pursuant to the commitment the child was put into the custody of the institution named therein, and was produced by its officers on the return of the writs of *habeas corpus* and *certiorari*. The only evidence in the record of the proceedings before the justice is found in the written complaint upon which the proceeding was initiated, and in the commitment itself. These papers show that the complaint was founded upon an assumed violation of section 291 of the Penal Code; that the accused was brought before the justice for examination on the charge stated in the complaint; that a hearing was had and witnesses examined, and that Elizabeth Van Riper, the mother of Florence, was present during the trial. The return of the appellant to the writs of *habeas corpus* and *certiorari* consisted simply of an averment that it was incorporated under the act of May 5, 1863, and the acts amendatory thereof; and that Florence Van Riper, by virtue of said act and by section 291 of the Penal Code, as amended by chapter 31, of the Laws of 1866, was committed to its custody by a police justice of the city of New York, under a commitment, a copy of which was annexed to the return, and that she was then held by the appellant thereunder. The evidence taken before the justice has not been returned and is not before us. The writs were not directed to the magistrate, but to the House of the Good Shepherd, by whom it was alleged the said Florence was detained, and they called simply for the production of her body before the court, and that the institution detaining her should certify the time and cause of her imprisonment. The commitment, while it does not set forth the evidence, recites in substance that the material allegations and matters set forth in the complaint were established to the satisfaction of the justice, by "competent testimony and evidence." The relator relies upon several grounds to

sustain the order of the Special Term sustaining the writs and discharging the said Florence.

First. It is insisted that the complaint before the justice did not bring the case within section 291 of the Penal Code. This ground is, we think, well taken as to the first charge in the complaint, viz.: "that the said Florence was found improperly exposed and neglected and wandering in the public park, to wit, Union Square Park in said city, without any proper guardianship." The only subdivision of section 291 to which this charge has any relation is the second, which specifies one of the conditions under which a child being so found is subjected to this summary jurisdiction, viz.: "Not having any home or other place of abode or proper guardianship; or who has been abandoned or improperly exposed or neglected by its parents or other person or persons having it in charge, or being in a state of want or suffering." The charge that the child was found "improperly exposed and neglected and wandering in the public park," did not, as observed by the General Term, warrant her arrest, unless she had been so exposed by her "parents or other person or persons having her in charge," and there is no such allegation. It must appear that the child was abandoned and neglected, by the fault of its parents or custodians, to justify taking it from their custody, on the ground of abandonment, or improper exposure or neglect. The information in these cases of summary conviction ought to be precise and show a case clearly within the statute. It is the foundation of the jurisdiction of the justice, and when it omits an essential ingredient or circumstance to bring the case under the statute, and the defect is not supplied by the evidence, the conviction is bad. It is not consistent with the proper security of personal liberty to indulge, in cases of summary convictions, in latitude or liberality of intendment to support the proceedings. They are conducted contrary to the course of the common law, without the intervention of a jury, usually before magistrates of limited experience, and are often

attended with the gravest consequences. This summary jurisdiction is, doubtless, most necessary to be maintained in the public interest, but at the same time the proceedings should be carefully scrutinized to see whether they are fully warranted by the statute. "I would fain know," said Lord HOLT in *Ree v. Whistler* (Holt's R. 215), "when a penalty is inflicted and a different manner of trial from *Magna Charta* instituted, and the party offending, instead of being tried by his neighbors in a court of justice, shall be convicted by a single justice in a private chamber, upon the testimony of one witness, if on a consideration of such a law we ought not to adhere to the letter." Neither does that part of the complaint, which charges, in connection with the circumstance, that the child was wandering in the public park, the further circumstance, "without proper guardianship," bring the case within the second subdivision. That language of the subdivision manifestly refers to those *waifs* who are homeless, having no abiding place and no guardian, and to a permanent and usual condition, and not to a child casually in the street without protection. In this case we cannot assume that the evidence was broader than the formal accusation. The finding or adjudication of the justice was in the exact language of the complaint. But the second averment in the complaint, viz., "that the said child was found in the company of Mary Ryan, who is a reputed prostitute," follows substantially the language of the fourth subdivision of section 291. This, according to the general rule governing accusations in criminal or *quasi* criminal proceedings, as matter of pleading, is sufficient. (*People v. Taylor*, 3 Denio, 91.) Whether the evidence supported the charge is another question. What constitutes "being in the company of reputed thieves or prostitutes" may not always be easily determined. I agree with the counsel for the relator, that the mere fact of a child meeting a prostitute in a public park, and unwittingly walking and being in her company on a single occasion, would not make a case within the statute. But the complaint, as such, was sufficient. Whether the charge was established can only

be known by an examination of the evidence taken before the justice, and that is not before us.

Second. It is insisted that upon this record it conclusively appears that the child Florence was not subject to be imprisoned, because she did no act and was not found under any circumstances which, according to section 291, made her amenable to conviction and imprisonment. This contention is based upon the fact that in the traverse of the relator to the return of the New York Catholic Protectory it was alleged, in substance, that Florence Van Riper had done no act prohibited by section 291 of the Penal Code, but was in the park, at the time charged in the complaint, for an innocent and lawful purpose, and having parents with whom she resided in Hoboken, New Jersey, etc. To this traverse the respondent demurred, thereby, as is claimed, admitting the facts therein, and consequently her innocence and her right to be freed from restraint. But it is to be observed that the facts stated only go to the point that in fact the child had not by her conduct rendered herself amenable to the jurisdiction of the magistrate. It was not alleged in the traverse that there was no evidence before the justice of the facts adjudicated by him. The traverse, in connection with the admission of the facts alleged by the demurrer, may show that the child was wrongfully charged with "being in the company of Mary Ryan, a reputed prostitute," but it cannot be inferred that no evidence justifying the finding by the justice of that fact was not produced before him. The demurrer presented simply the question whether a summary conviction can be set aside on *habeas corpus* or *certiorari* on averment and proof that the fact proved before the magistrate, upon which the conviction depended, was not true, and that the real fact was otherwise, and if known would have entitled the accused person to his discharge. In other words, can there in this proceeding be a retrial upon the merits of the question whether the child had or had not committed any act or been found in any situation which subjected her to restraint or imprisonment under sec-

tion 291 of the Code. The authorities conclusively settle this question adversely to the claim of the relator. Where a court or magistrate, exercising special or limited powers, has jurisdiction, the proceedings are entitled to the same presumption of regularity which attaches to proceedings of courts of higher jurisdiction, and when there is presented to a court or magistrate, exercising a summary jurisdiction, evidence of an essential fact, the judgment and decision of the court or magistrate upon the fact cannot be overhauled in a collateral proceeding, but is conclusive as is the judgment of a court of general jurisdiction until reversed on appeal. (*Brittain v. Kinnard*, 1 B. & B. 482; *People v. Cassels*, 5 Hill, 164; 1 Smith's L. Cas. note, pp. 976, 992 and cases cited.) We are of opinion, therefore, that as the commitment recites that the conviction proceeded upon proof by competent and satisfactory evidence of the charge made, and this recital is not contradicted, the admission of the facts alleged in the traverse furnishes no ground for the discharge of the child in this proceeding.

Third. It is further insisted that the magistrate proceeded without jurisdiction by reason of an omission to give notice of the proceedings to the father of the child. The recital in the commitment that "Elizabeth Van Riper, the parent, guardian and custodian of such child," was present at the examination and that she had such notice of the examination as the magistrate "deemed and adjudged sufficient," is not controverted in the record. But it is alleged in the traverse to the return, and admitted by the demurrer thereto, that "no notice was ever given of any of said proceedings before the committing magistrate to Thomas D. Van Riper, the father of such infant Florence, in whose house said Florence was then residing, and who was the natural guardian of said child; nor was the said Thomas D. Van Riper present at the examination of said child's case before the justice." The question is, therefore, presented, whether notice of the proceeding was required to be given to the father of the infant as a condition to a valid adjudication under section 291, of the Penal Code,

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as amended by chapter 31, of the Laws of 1886, there having been no notice, except to the mother, who was present at the examination. It was held by this court in the case of *People ex rel. Van Heck v. New York Catholic Protectory* (101 N. Y. 195), being the same institution to which the child in this case was committed, that it was an essential prerequisite to a valid, final commitment to the protectory in a case arising under section 291 of the Penal Code, that notice should be given to the father of the child, in accordance with the provisions of the Consolidation Act of 1882 (§§ 1618 *et seq.*), although the mother was present during the proceedings, and the court affirmed the order of the court below, discharging the son of the relator for want of such notice. Section 291 was amended in 1886, after the decision in the *Van Heck* case, by inserting the following provision: "Whenever any child shall be committed to an institution under this Code, and the warrant of commitment shall so state, and it shall appear therefrom that the parent, guardian or custodian of such child was present at the examination before such court or magistrate, or had such notice thereof as was by such court or magistrate deemed and adjudged sufficient, no further or other notice required by any local or special statute in regard to the committal of children to such institution shall be necessary." The precise question now presented is, whether the mother having been present at the examination, which the magistrate adjudged to be sufficient notice to her, was notice of the proceedings to the "parent, guardian or custodian" of the child within the provisions of the amendment of 1886. The word is "parent," in the singular. The mother, of course, is one of the parents. Is it the true meaning of the statute that notice to either parent is sufficient, or did the statute intend that when both parents were living, the notice should be given to the one who is the child's natural guardian and custodian, which is the situation of the father if he be living. (*People ex rel. Nickerson v. —*, 19 Wend. 16.) Under the Consolidation Act (§ 1619), the notice is to be served on the father, if living, etc., and if not, on the mother, etc.

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The two acts are in *pari materia*, and the former act may, we think, be considered in construing the later one. The father is the parent who, probably, in most cases, would be best able to provide for the proper defense of the child. The proceeding directly affects his right of parental control and custody. We think the amendment of 1886 implies that notice must be given to the parent either under the consolidation act, or under section 291 of the Code, as amended. It need not, of necessity, be personal, and, under section 291, the magistrate may adjudge what and how notice shall be given. The learned judge, at Special Term, placed his decision, discharging the child, upon the ground that, under the statute, notice must be given to the father. The question is not free from difficulty, but we think the statute may and, perhaps, ought to receive this construction. The fact that the father is not the relator and does not make the application for the discharge of the child, has, we think, no bearing upon the legal question involved. The rights of the child are primarily in question, and every step which the statute requires to be taken in the exercise of this summary jurisdiction, must be observed. These views lead to an affirmance of the orders of the Special and General Terms, but it should be without costs in this court, and we think, also, that costs should not have been granted in the court below, and that in that respect, the order should be modified. (*See People ex rel., etc. v. Gilmore*, 88 N. Y. 626.)

All concur.

Order affirmed.

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HENRY C. ADAMS, Respondent, v. OLIVER M. ARKENBURGH,
Testamentary Guardian, etc., et al., Appellants.

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Where notice is served with the summons, that in case of default plaintiff will take judgment for a sum specified, this is his statement of the amount involved, and it is not for him to say on application for an extra allowance of costs that the notice is a nullity.

In an action wherein such a notice was served, the complaint alleged a partnership between plaintiff and A., defendant's testator, an investment by the latter of specific amounts of the partnership funds in the purchase of specified real estate and securities, the receipt by him of the rents and dividends, an approximate estimate of the amount of which was given, and also alleged that the income of the partnership received and so invested by A. and the dividends, interest and profits accruing from such investments amounted to not less than \$200,000. The judgment asked was for a dissolution of the partnership, an accounting of the partnership business, and of the investments, receipts of dividends, interest, etc., as specified in the complaint. Judgment was rendered in favor of defendants. An order of Special Term granting defendants an extra allowance was reversed by the General Term "on questions of law" only. *He'd*, error; that one-half of the values stated in the complaint of the property, securities, etc., specified as the assets of the partnership constituted the subject-matter involved and furnished a sufficient basis for the computation of an allowance; that the judgment was conclusive as to defendant's right to retain the same; and that a case was made out authorizing the court below to exercise its discretion as to an extra allowance.

The order of General Term, therefore, reversed and the case remitted to it for consideration upon the merits.

(Argued June 1, 1887; decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 24, 1886, which reversed, "upon questions of law and not upon a review of the discretion" of the court, an order of Special Term granting to defendants an extra allowance of costs.

The facts material to the questions discussed are stated in the opinion.

Robert Forsyth Little, Fred M. Littlefield and Louis C. Whiton for appellants. It is immaterial that the form of the

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action and the relief prayed for would not authorize a money judgment in favor of either the plaintiff or any of the defendants. (*Mingay v. Holly Mfg. Co.*, 99 N. Y. 270.) Admitting that the defendants would not be entitled to an allowance under the first clause of section 3253 of the Code, viz., "upon the sum recovered or claimed," a pecuniary right was directly involved in this action, and the value of that right was the basis for an allowance under the last clause of the section, viz., "upon the value of the subject-matter involved," and the allowance granted should stand. (*Comens v. Sup'rs*, 3 T. & C. 269; 64 N. Y. 626; *Williams v. W. U. Tel Co.*, 1 Civ. Pro. R. 194; *Darling v. Brewster*, 55 N. Y. 667; *Fisher v. Hepburn*, 48 id. 41; *Davis v. Glean*, 14 How. Pr. 310; *Gooding v. Brown*, 35 Hun, 153, 156; *Morrison v. Agate*, 20 id. 23; *Rutty v. Person*, 6 Civ. Pro. R. 15, 25; *Struthers v. Pearce*, 57 N. Y. 365; *Harriman v. Ryder*, 44 N. Y. Supr. Ct. 330; *Burke v. Candee*, 63 Barb. 552; *Sickels v. Richardson*, 14 Hun, 110; *Lattimer v. Livermore*, 72 N. Y. 174; *Ogdensburgh R. R. Co. v. Vt. R. R. Co.*, 63 id. 176; *People v. A. & Vt. R. R. Co.*, 16 Abb. 465; *Mingay v. Holly Mfg. Co.*, 99 N. Y. 270.) The determination of the question whether a case is difficult and extraordinary rests almost wholly in the discretion of the judge granting the allowance. (*Downing v. Marshall*, 37 N. Y. 380; *Byron v. Durrie*, 6 Abb. Pr. 135; *Morse v. Hasbrouck*, 13 Week. Dig. 393; *Hurd v. F. L. & T. Co.*, 16 id. 480.) No general rule for granting allowances in particular cases can be given; each case must be determined according to its own peculiar circumstances. (*Sackett v. Ball*, 4 How. Pr. 11; *Fox v. Gould*, 5 id. 274; *Gooding v. Brown*, 35 Hun, 156.) The party claiming the error in the granting of the allowance must establish the error, otherwise it will be presumed that the allowance was a proper one upon the facts before the trial court. (*Everingham v. Vanderbilt*, 12 Hun, 75; *Gooding v. Brown*, 35 id. 156; *Diese v. Jennings*, 3 Abb. Pr. 240.) The question as to the allowance by the trial justice was improperly raised at the General Term. No appeal was

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pending from the order granting it. (Code of Civ. Pro. §§ 1301, 1316; *Reese v. Smyth*, 95 N. Y. 645; *Patterson v. McCann*, 38 Hun, 531; *Ball v. Davis*, 1 N. Y. 517; *Boos v. W. M. L. I. Co.*, 64 id. 236, 242; *Jones v. Sparks*, 2 id. 139; *Callonan v. Gilman*, 52 Super. Ct. [20 J. & S.] 496; *Dick v. Livingston*, 4 N. Y. 202.)

H. V. Borst for respondent. The importance of a litigation, in any other than its pecuniary aspect, does not afford the basis for an extra allowance. (*Conaughty v. Sar. Co. Bk.*, 92 N. Y. 401.) The allowance can only be made on the basis of a money value. (*Coates v. Goddard*, 2 J. & S. 118; *People v. A. & S. R. R. Co.*, 5 Lans. 35) There is in this case no basis for a computation for an extra allowance. (Code, § 3253; 92 N. Y., 401, 404; *Struthers v. Pearce*, 51 id. 365; *Weaver v. Ely*, 83 id. 89.) In an action for an accounting, no fixed and definite sum being claimed in the complaint, as due to the plaintiff, no extra allowance can be granted upon the dismissal of the complaint. (*Budd v. Smales*, N. Y. D. Reg., Mar. 14, 1884 or 1885; 8 Civ. Pro. R. 230; *Coleman v. Chauncy*, 7 Rob. 578; *Meyer v. Rasquin*, 20 W. Dig. 98.)

DANFORTH, J. As appears from the recitals in the order appealed from, the order of the Special Term was reversed upon questions of law and not upon a review of the discretion of the judge by whose directions the order for an extra allowance of costs was given. It is to be conceded that if the subject-matter of the litigation has no pecuniary value, or if its value is not shown, such allowance is not authorized (*Conaughty v. Saratoga Co. Bank*, 92 N. Y. 401), for under the Code (§ 3253), it is, if allowed, to be computed upon the sum recovered or claimed, or upon the value of the subject-matter involved. But the concession does not aid the appellant, for as plaintiff in the action he gave notice with the summons that upon default of an appearance or answer, judgment would be taken by him in the sum of \$65,000, with interest from April, 1875, and it is not for him to say that

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this notice is a nullity. It is his statement of the amount involved in the action. The complaint justifies the statement. It alleges the plaintiff's partnership with the deceased, Henry Adams, an investment by the latter in his own name of specific amounts of the joint funds of the partnership in the purchase of specific real estate and securities, and the receipt by him of the rents and dividends issuing therefrom, amounting in the aggregate to large sums, of which an approximate estimate is made; and, further, the plaintiff alleges with absolute definiteness that "the average income of said partnership was not less than \$5,000 per annum, equal in gross sums to upwards of \$100,000, which was received and invested by said Henry Adams in manner hereinbefore stated; and that said Henry Adams received all dividends, annual interests and profits accruing from such investments, amounting in gross sum to another \$100,000, equal in all to not less than \$200,000, all of which facts he states according to his best recollection, information and belief."

The judgment asked is that the partnership be dissolved, and also that an account be taken, not only of the partnership business but of the receipts of moneys, investment of the same, dividends, rents, etc., and of all the rights, etc., of the plaintiff in respect thereto as specified in the complaint. One-half of the property, securities and money mentioned as the assets of the partnership, constitute the subject-matter involved, that being the plaintiff's share, if a copartner, and one-half of the value, as stated in the complaint, furnishes a sufficient basis for computation of an allowance. The judgment rendered is conclusive of the right of the defendants to retain, as the individual property of Henry Adams, all the property described, and we think a case was made upon which the discretion of the trial judge as to allowance might be exercised.

The cases cited by the respondent differ from the one in hand. In *Weaver v. Ely* (83 N. Y. 89) the plaintiff's legacies were only payable after the testator's debts, the estate was shown to be insolvent, and it seemed clear that the plaintiff's

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claim was without value. In *Struthers v. Pearce* (51 N. Y. 365) the allowance was reduced to a sum estimated on one-fourth of the value of the lease (that being the property in question), the plaintiff claiming no interest beyond that. Here the plaintiff claims as equal partner, and there is no suggestion that the sums stated are subject to any deduction. They might be increased and added to by other items, as to the detail of which the plaintiff assumed ignorance, but not reduced, for as to those enumerated the plaintiff spoke from knowledge or information, upon the faith of which he made the allegations. The decision of the trial judge is, however, subject to review by the General Term; and as that court has disposed of it without passing upon the merits its order should be reversed and the case remitted to it for further consideration.

All concur.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, v. THE KNICKERBOCKER LIFE INSURANCE COMPANY, CHARLES H. RUSSELL, Receiver, etc., Appellant, PLEASANT H. PENDLETON et al., Respondents.

Before the dissolution of the defendant by the judgment in this action and the appointment of a receiver of its property, a judgment had been recovered against it in a United States Circuit Court upon a policy of insurance theretofore issued by it. Defendant had taken the case, by writ of error, to the United States Supreme Court for review, had given a bond with sureties, and had given as indemnity to the latter a mortgage upon certain of its property and an assignment of a mortgage. The receiver, on application to the court which appointed him, was directed to employ counsel to argue the cause on hearing of the writ of error. The judgment was reversed and a new trial granted. Subsequently the plaintiffs in that action took judgment by default. The receiver was never made a party thereto and took no part in the conduct of the defense. Said judgment was presented as the basis of a claim to a share in the funds of the dissolved corporation in the

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hands of the receiver, and it was claimed that the receiver was concluded thereby. *Held*, that as to the defendant of record, its dissolution put an end to the action, and at the time of the rendition of the judgment it had no property against which a judgment could be enforced; that the receiver could not be affected by said judgment unless he had by some action, under the direction of the court appointing him, made himself responsible for the final result; that his intervention in the United States Supreme Court did not make him so responsible, as it was simply for the purpose of protecting the assets in his hands from an incumbrance which had no connection with the subject matter of the litigation, and the reversal of the judgment ended his connection with the action, and the parties litigant were thereby restored to the same position in which they were prior to its rendition; that the United States Circuit Court acquired no jurisdiction over him or over the funds sought to be reached by its adjudication; and that therefore, the receiver was not estopped by the judgment.

Castle v. Noyes (14 N. Y. 329), and *Jay v. De Groot* (2 Hun, 205), distinguished.

People v. Knickerbocker L. Ins. Co. (43 Hun, 574), reversed.

(Argued June 22, 1887; decided October 4, 1887.)

APPEAL by Charles H. Russell, receiver of the defendant, the Knickerbocker Life Insurance Company, from an order of the General Term of the Supreme Court in the first judicial department, made April 23, 1887, which reversed an order of Special Term disallowing the claim of Pleasant H. Pendleton and others to a share in the assets in the hands of the receiver. (Reported below, 43 Hun, 574.)

The nature of the claim and the material facts are as follows: The Knickerbocker Life Insurance Company was dissolved in December, 1882, by a decree of the Supreme Court of this State, and the appellant appointed receiver of its property. Prior to that time a judgment had been rendered against the company, by the Circuit Court of the United States, for the Western district of Tennessee, in favor of Pleasant H. Pendleton and others, upon a policy of insurance theretofore issued by it. The company sued out of the Supreme Court of the United States a writ of error for its review, and in that proceeding gave a bond with sureties. The receiver, having ascertained that the company had given these sureties a mortgage upon certain portions of its property

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in the State of New York, and an assignment of a mortgage covering other property, by way of indemnity against liability on the bond, reported these facts to the court, whose officer he was, and, under its direction, employed counsel to argue the cause upon the hearing of the writ of error. A decision was afterwards made, reversing the judgment and awarding a new trial. But before the mandate was sent down it was discovered that the citation had been irregularly issued, inasmuch as it had been addressed to only one of the four parties who were plaintiff's below, and the Supreme Court, of its own motion, made an order requiring the parties to the writ of error to show cause why the decision should not, for that reason, be vacated and set aside, and the writ of error dismissed. Whereupon the receiver by petition, stating to the court his ignorance, until that time, of the proceedings in question, asked that by amendment the irregularity might be cured, so that the decision should stand and the mandate of the court issue. As a reason for his interference, he stated in his petition that, "upon taking charge of the property of the company," he found it incumbered by the mortgages and assignment above referred to, "and that all of said property remained incumbered thereby, awaiting the issuance of the mandate of the court."

The request was granted, and after reargument the mandate of the court was issued pursuant to the original decision. The receiver was never made a party to the record in either court; nor did he in any way take part in the conduct of the defense, nor did he control or direct it in any way. Subsequently, and on the 25th of January, 1886, the plaintiffs in the action took judgment by default against the company for \$17,560.12 damages, besides costs, and presented that judgment as the sole, but as they claim conclusive, basis of a right to share in the funds of the dissolved corporation in the custody of the receiver. The claim so made was sent by order of the court to a referee to determine as to its validity, and he, upon the facts above stated, reported (1) that the judgment was without jurisdiction so far as the assets under the control of the

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court were concerned; (2) that the claim was not a valid charge, nor entitled to a distributive share of them. His report was confirmed by the Special Term, but its order to that effect was reversed by the General Term of the Supreme Court and an order made that the receiver allow the claim as valid against the assets of the company, and pay the same in the due course of the administration of his trust.

Leslie W. Russell for appellant. The judgment rendered by the United States Circuit Court of Tennessee is not conclusive against the receiver. (*In re Norwood*, 32 Hun, 196; *McCulloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 id. 384; *Mumma v. Potomac Co.*, 8 Pet. 286.) Judgments, such as the one under discussion, are not within the provisions of the Federal Constitution, declaring (art. 4, § 1) that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." (*In re Norwood*, 32 Hun, 196, 199.) The Massachusetts court had jurisdiction of the subject-matter and the persons holding it, and could make a valid judgment without acquiring jurisdiction of either the defunct corporation or its receivers. (*Hibernia B'k v. Mech's B'k*, 21 Hun, 166; *Kelly v. Crapo*, 45 N. Y. 86.) In cases like the present it is the peculiar province of the court having the funds in its possession to determine for itself all rights to the fund. (*O'Mahoney v. Belmont*, 62 N. Y. 133, 149.) The record of the United States Circuit Court of Tennessee does not in any manner show that that court acquired jurisdiction of the person of the receiver. It is not competent to prove by parol evidence, in aid of the record, that the court did obtain such jurisdiction. (*Noyes v. Butler*, 6 Barb. 613.) The appearance of the receiver's counsel before the Supreme Court, to object to the validity of the judgment, is not an appearance which can bind him to further litigate the matter, nor can he be bound by any judgment subsequently rendered in the action, unless the court which renders such judgment acquired by some proper proceeding jurisdiction of the person of the

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receiver. (*Cruger v. Hudson R. R. Co.*, 12 N. Y. 190.) No judgment of the Circuit Court of Tennessee could be binding upon the receiver, as a non-resident of that State, without personal service of the process upon him. (*Pennoyer v. Neff*, 95 U. S. 714.)

A. Walker Otis for respondents. The receiver, by participating in the litigation and accepting the benefits of the same, is bound by the result thereof. (*Castle v. Noyes*, 14 N. Y. 329; *Jay v. De Groot*, 2 Hun, 205.) The position taken by the receiver is untenable. That what he did in the cause is analogons to what a litigant may sometimes do under a special appearance is untenable. (*Habich v. Folger*, 20 Wall. 1.)

DANFORTH, J. We think the appeal should prevail. As for the defendant of record, its dissolution put an end to the action; and at the time of the rendition of the judgment it had neither legal existence, capacity to be sued, nor any property against which a judgment could be enforced, while the receiver, who by authority of law had taken its effects, had not been made a party to the action in which the judgment was recovered. It is, therefore, plain that the funds in his hands should not be affected by it, unless by interference or otherwise, under the direction of the court appointing him, he has made himself responsible for the final result of the litigation between the parties. (*McCulloch v. Norwood*, 58 N. Y. 563.) His authority to do the acts relied upon by the respondents was derived from the court from whom he received his appointment, and its exercise was necessary for the protection of property which had come to his hands. He was directed to argue, for the plaintiff in error, the case as it was presented to the appellate court, and he was allowed to intervene for the mere purpose of protecting such interest as he might have, and for the purpose of being heard on the argument. He had nothing to do with any proceeding in the action, nor with the cause of action. He was confined to the record of those proceedings, and could only submit

the judgment of the inferior tribunal to re-examination. He was required to do this because of his interest in the property held by the sureties, and his duty to protect it as increasing, if their lien was discharged, the assets in their hands. He would also, it may be assumed, have been bound by the judgment rendered by the Supreme Court, had it been adverse to the plaintiff in error. But the writ of error asserted no claim or demand in behalf of the plaintiff in error. It could not in any way act upon the parties; it acted only upon the record; and because, as the result shows, the receiver successfully pointed to errors in the record which required the reversal of the judgment, it is now claimed that he is bound by a judgment upon the merits, rendered upon a trial in which he did not participate, in an action to which he was not a party and over which he neither exercised nor assumed control. There is no equity in such a result, and it is not required by the cases cited by the respondent, viz.: *Castle v. Noyes* (14 N. Y. 329), and *Jay v. De Groot* (2 Hun, 205). In the first case the master in person was a party in one action, and in the other his servant; but the master conducted the proceedings as was his duty, and the decision was put upon the familiar doctrine that the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties, depending on the same question. It can have no application here, where the question is whether the appellant was a party in fact. In the second there was a motion in a foreclosure case to enter judgment for deficiency. It had been once made and denied. The appealing party, although not a party to the record, was a party in interest, and had been heard both by affidavit and counsel, and for that reason was held to have been an actual party to the motion, and subject to the rule that a motion once decided is final, unless leave is given to renew. If the appellant were asking to reargue the questions disposed of on the writ of error, the general rule thus stated might apply, he having been once heard. Such, however, is not the object of the present proceeding. The reversal

destroyed the effect of the judgment, and the original cause of action was no longer merged, but let loose, and the parties litigant were restored to the same condition in regard to it in which they were prior to its rendition. The subsequent trial and judgment concerned that, and had nothing to do with the writ of error. As to the cause of action, the receiver has not only not been heard, but he had no right nor opportunity to be heard respecting it. The sole object and reason of his intervention on the hearing of the writ of error was to protect the property in his hands from an incumbrance which had no connection with the subject-matter of litigation in the original suit, but which grew out of a distinct and collateral act of the company after judgment in that suit, and in aid of its endeavor to avoid it. With those proceedings the court in Tennessee had nothing to do. The receiver committed no act within its jurisdiction, nor was the property which he sought to release ever under its control. It at no time acquired jurisdiction over him, nor over the funds now sought to be reached by force of its adjudication, and we are unable to find any ground upon which the case before us can be made an exception to the general rule that a person is not estopped by a judgment to which he is not a party.

The order appealed from should, therefore, be reversed, and the order of the Special Term affirmed, with costs of the appellant in all courts to be paid by the respondent.

All concur.

Ordered accordingly.

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SAMUEL WEEKS et al., Respondents, v. JACOB WEEKS et al.,
CORNWELL et al., WILLIAM A. PARKE et al., Appellants.

The court has power to authorize a receiver appointed in a partition suit to lease the property, *pendente lite*.

To justify the receiver in applying for authority to lease, and the court in granting the application, it is not necessary that the power to lease shall be given in the order appointing the receiver, or that said order give him liberty to apply for instructions.

The court may authorize a lease for a term certain, the ordinary term of lease for such premises, although it may extend beyond the termination of the litigation.

It seems that a lease beyond the customary term, which might extend beyond the litigation, would be an unjustifiable exercise of judicial discretion.

Absence of notice to the parties of the application by the receiver for leave to lease is not a jurisdictional defect, and does not invalidate the order or the lease executed under it.

It seems, however, that notice should be required.

Where a lease has been executed by the receiver under an *ex parte* order of the court, for a term extending beyond the close of the litigation, the court has power to modify or vacate the order, although the rights of the lessee may be affected thereby.

In such case the court has power to award indemnity to the lessee as a condition of granting the motion to vacate or modify; and where the judgment directs a sale of the premises the court may direct the indemnity to be paid out of the fund arising on sale.

In a partition suit a receiver was appointed, with authority to lease the premises for the term of three years. About six months prior to the expiration of the leases, executed in pursuance of such authority, and pending an appeal to the General Term from the judgment in the action, upon an *ex parte* application of the receiver and on affidavits showing that the litigation would not be terminated until long after the expiration of the leases, the court made an order authorizing the receiver to lease for a further term of three years, that being generally the shortest term for which such property could be advantageously rented; leases were executed accordingly. The litigation was, in fact, closed within a year after the commencement of the second terms. On motion of the parties the *ex parte* order was modified so as to authorize a leasing for but one year, and the leases were declared invalid except for that period. *Held*, that the court had jurisdiction to make the *ex parte* order, and the fact that the litigation terminated within the first year of the new term did not affect its validity; also, that the court had power to modify the order, but as the leases were valid when executed and the

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lessees acted in good faith in reliance upon the order, and as the parties had waited until final judgment before moving, with knowledge that the property was in the occupation of tenants after the expiration of the first leases, the tenants were entitled to indemnity

(Argued June 22, 1887; decided October 4, 1887.)

APPEAL by William A. Parke et al., tenants, from an order of the General Term of the Supreme Court in the first judicial department, made May 13, 1887, which affirmed with "costs and disbursements" against the appellants an order of Special Term, modifying a previous order, authorizing the execution of the leases under which the appellants claim, and directing the retention and deposit, subject to the further orders of the court, of a sum specified out of the proceeds of the sale of the premises described in the complaint.

This was an action for partition. The rights and interests of the parties were in dispute and a receiver, *pendente lite*, was appointed.

The facts material to the questions involved in this appeal are stated in the opinion.

Edward M. Shepard for appellants. The relief, if any, to which the moving parties were entitled, could not, as against them, not being parties to the action, be obtained upon motion or otherwise than by action. (*Hill v. Heermans*, 59 N. Y. 396.) The direction which the court gave the receiver by the order of October 19, 1885, was valid without formal notice to the parties of the receiver's application for the instruction of the court. (Thompson on Prov. Rem. 484, chap. 5, § 8; *Smith v. Stage Co.*, 28 How. 377; Wade on Law of Notice, § 1186; *Fischer v. Langbein*, 103 N. Y. 84; *Day v. Bach*, 87 id. 56.) The order appointing the receiver and the later order authorizing the present leases were part of the action and were fortified and protected by the *lis pendens*. (*Shreeve v. Hankinson*, 34 N. J. Eq. 413.) A receiver may, with the sanction of the judge, demise for terms of years. (*Dancer v. Hastings*, 4 Bing. 2; Kerr on Receivers, 210; *Ellicot v. U. S. Ins. Co.*, 7 Gill [Md.] 308; *Keeney v. Home*

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Ins. Co., 71 N. Y. 396; 2 Daniell's Ch. Pr. [4 Am. ed.] 1715, 16, 41; Story's Eq. Jur. § 831.)

Flamen B. Candler for respondents. The receiver, and all the persons holding under him, as tenants, are bound by the notice of the pendency of this action, filed April 24, 1882, to the same extent as the parties to the action and all persons claiming under them; and they are concluded from all interest in the premises by the judgment of March 19, 1886, and by the sale made thereunder. (Bennett on Lis Pendens, §§ 14, 15; *Becker v. Howard*, 47 How. Pr. 423.) The receiver was appointed *pendente lite*, and his powers and duties must be found in the order by which he was appointed. (*Foster v. Townsend*, 68 N. Y. 203, 206; *Keeney v. Ins. Co.*, 71 id. 396-401; *Finke v. Finke*, 25 Hun, 616-618; *Green v. Winter*, 1 Johns. Ch. 60; *Bank v. White*, 6 Barb. 589-597; *Negus v. Brooklyn*, 1 Code R. 471-483; *Verplank v. Ins. Co.*, 2 Paige, 438-452.) He was bound in law to give notice to all the parties to the action before attempting to lease the property for a term of years, and it was his duty to apply to the court for further instructions under the order appointing him. (Rule 192, Court of Chancery; Rule 78, Hun's Court Rules; *Shreves v. Hankinson*, 34 N. J. Eq. 413; *Vincent v. Parker*, 7 Paige, 65; *Verplank v. Verplank*, 22 Hun, 104; *Foster v. Townsend*, 68 N. Y. 206; *Lane v. Lutz*, 3 Abb. Ct. App. Dec. 19; *Bolles v. Duff*, 37 How. Pr. 162-166.) The court, at Special Term, had the power to modify the *ex parte* order of October 19, 1885, and having exercised its power and discretion, and the order having been affirmed, this court should not, upon all the facts in the case, disturb the same. (*In re City Buffalo*, 78 N. Y. 362; 16 Hun, 49; *Dinsmore v. Adams*, 48 How. Pr. 274; Code, § 724; *Bolles v. Duff*, 37 How. Pr. 162-166.)

ANDREWS, J. The order of February 6, 1883, appointing the receiver in the action, was made on the petition of one of the defendants, upon notice to the other parties, and was

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granted without opposition. The property sought to be partitioned consisted of four houses and lots on Fifth avenue, in the city of New York, of great value, and the rights and interests of the several parties depended upon the construction of the will of Jacob Weeks, deceased, and involved the determination of complicated and difficult questions. The main object of the receivership was to secure the renting and care of the premises pending the litigation, for the benefit of the parties who should be adjudged to be vested with the legal title to the property. The order, therefore, authorized the receiver to lease the premises, or any part thereof, for a term not exceeding three years from May 1, 1883. The receiver, under the authority conferred, leased the several houses and lots at a large rent for terms expiring May 1, 1886. On the 19th of October, 1885, pending the appeal to the General Term from the judgment of the Special Term, the receiver, upon an affidavit stating that the action was pending on appeal to the General Term, and that he had been informed by the attorney therein that the case would be carried to the Court of Appeals, and that the case would not be finally determined till long after May 1, 1886, and also that unless he was empowered to renew the leases for another term the tenants might leave, and the houses remain untenanted after that date, applied *ex parte* to the court at Special Term for liberty to renew the leases, and the court thereupon made an order authorizing the receiver to lease the property "for a term or terms beginning from the 1st of May, 1886, and not extending beyond the 1st of May, 1889." The receiver thereupon renewed the leases to two of the tenants in possession for three years from May 1886, and granted a new lease of one of the houses and lots to a new tenant for the same term. The General Term, May 3, 1886, affirmed the judgment of the Special Term declaring the rights and interests of the several parties, and directing a sale of the premises. That judgment was affirmed by this court in February, 1887. The present appeal is from an order of the General Term affirming an order of the Special Term made after the affirm-

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ance of the judgment by this court, upon the application of the parties to this action, modifying the order of October 19, 1885, so that it should stand as an order authorizing the leasing by the receiver for the term of one year only from May 1, 1886, and declaring that the leases executed by the receiver were valid only for the term of one year.

The first question relates to the jurisdiction of the court to grant an order on the application of a receiver, *ex parte*, without notice to the parties to the action, for the leasing of real property, which is the subject of the receivership, for a term certain which may extend beyond the termination of the litigation. It is well settled that a receiver cannot *ex mero motu* let the premises which he holds as receiver. "He cannot," said Lord THURLOW, "set and let, or make expenditures upon the estate, without an application to the court," and a lease granted by a receiver without the order of the court was held, in *Dunford v. Lane* (cited in 1 Bro. C. C. 160), to be invalid. Formerly, under the English practice, a receiver was not ordinarily permitted to originate steps or proceedings on his own motion. The parties were left to make such application in the case as might be deemed necessary, although the rule was not absolute and applications were allowed to be made by the receiver under special circumstances. (*Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 id. 497; *Wrixon v. Vize*, 5 Ir. Eq. 276.) In this country a broader view is taken, and it is common practice for receivers, on their own motion, to apply to the court for directions as to the execution of their duties. (High on Receivers, §§ 181, 188, and cases cited.) Orders appointing receivers usually contain a clause giving to the receiver liberty to apply to the court for instructions; and where real property is the subject of the receivership the order not infrequently confers the power to lease. We apprehend, however, that it is not necessary under our practice that the order appointing a receiver should contain these provisions in order to justify the receiver in applying for instructions, or the court in granting an application therefor, or in

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authorizing the receiver to lease the property. It is said that the court has no power to authorize a receiver, *pendente lite*, to lease for a term certain, so as to make the lease valid beyond the period of the litigation. There can be no doubt, having in view the object of such receivership, which is to take the care and custody of the property and administer it during the litigation and to hold it to answer the final judgment in the action, that a lease beyond the customary term, according to the nature of the demised property, which might extend beyond the termination of the litigation, would be an unjustifiable exercise of judicial discretion. But to deny the power of the court to authorize a lease for a term certain in any case, or to hold that every lease so authorized is terminable, *ipso facto*, on the termination of the litigation, would, as was said in *Shreve v. Hankinson* (34 N. J. Eq. 413), often prevent any leasing of the property at all. It is customary to lease farms for not less than a year, and the better class of dwellings, especially where the tenant is to furnish, are usually let for a term certain. When such property is in the hands of a receiver, *pendente lite*, and the termination of the suit is uncertain, it would often result in great loss if the court had no power to authorize a lease for the customary term, except upon the consent of all the parties interested. The receiver is the officer of the court. In virtue of its general jurisdiction the court in a proper case assumes for the time being the care and custody of the property. The receiver represents all interests and under the direction of the court manages the property for the benefit of all concerned. The power of the court to authorize leases by a receiver for a term certain was recognized by rule 192 of the former court of chancery, in cases of receivers in creditors' suits, and is also recognized by the present rule of the Supreme Court (93) which permits a receiver to make leases, from time to time, as may be necessary, for terms not exceeding one year. In *Daniel's Chancery Practice* (4 Am. Ed. 749) it is said that "in an ordinary case a receiver may, in his discretion, let for a year or less, or for any term not exceeding three years,

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without applying for the sanction of the judge." The power in England seems now to be regulated by general orders, and the language quoted is to be interpreted in view of this fact. The court, in making the order of October 19, 1885, did not, we think, transcend its power, in authorizing the receiver to lease for the term of three years, provided it could grant the order *ex parte*, without notice to the parties to the action. It appears, without contradiction, that three years was generally the shortest term, for which unfurnished houses of the description of those in question, could be advantageously rented in the city of New York. This was the term for which they were first rented, under the order appointing the receiver. The duration of the litigation was uncertain when the order of October 19, 1885, was made. The fact that it was terminated within the first year of the term does not affect the validity of the leases, provided the court had jurisdiction to make the order under which they were executed. But it is insisted that, assuming that the court had power on notice to the parties interested, to make an order authorizing the receiver to lease the property for a term certain, it had no power without notice to them, or giving them an opportunity to be heard, to bind the property by leases extending beyond the termination of the litigation. We are of opinion that the absence of notice to the parties of the application, by the receiver, was not a jurisdictional defect rendering the order made thereon void. The question in this aspect is one of power, and not of propriety. We cannot doubt that if the attention of the judge had been called to the subject, he would not have made so important an order, without notice, to the parties to the litigation. The English courts, as we have seen, are very reluctant to entertain applications made by a receiver in an action, without the presence or intervention of the parties, and a wise discretion dictates the reasonableness of requiring a receiver who seeks the direction of the court, in important matters, affecting the administration of his trust, to give notice to the parties beneficially interested in the property. But we can-

not say that this is an essential condition to the exercise by the court of its jurisdiction. Under the English practice, prior to the enactment of the general rules, an application for liberty to lease property in the hands of a receiver was made by a party and not by the receiver, "and was obtained as of course" (2 Dan. Ch. Pr. 1982; High on Receivers, § 194), without notice to the other party. In *Neale v. Bealing* (3 Swanst. 304, note) a motion of course was made for sequestrators to set and let the estate. It was denied, the Lord Chancellor saying, "I cannot allow this without notice to the other side, for though it is a motion, of course, to obtain liberty for a receiver to set and let, and now most orders are drawn up with such express power in them, yet the reason of both of them is that he is appointed by the court, for the management of the estate, but sequestrators have but precarious or temporary power to levy a debt, and the sequestration may be taken away to-morrow or as soon as the demand is satisfied." The court in directing a lease acts through its receiver, and, however proper it may be to require notice, there is, we think, no inflexible rule of law that it cannot act without notice, or that leases executed under its authority, without notice, are void.

The next question relates to the power of the court to modify or vacate the order so as to affect the rights of lessees who took their leases in reliance thereon. The general power of a court to modify or vacate its judgments or orders for fraud or irregularity, or where it has acted inadvertently, or improvidently, is well settled. It is true, the law protects the title of a third person, being a *bona fide* purchaser on a sale on an execution under a judgment voidable but not void, although the judgment is subsequently reversed for error (*Manning's Case*, 4 Coke, 329; *Woodcock v. Bennet*, 1 Cow. 711.) This principle does not, we think, preclude the court from modifying or vacating a summary order made improvidently in the course of an action although the rights of third persons may be affected thereby. (See *Hale v. Clauson*, 60 N. Y. 339, and cases cited.) The court had,

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therefore, power to set aside or modify the order of October 19, 1885. But the leases were not void. The lessees acted *bona fide* in reliance upon the order of the court, and will as the affidavits tend to show, be subjected to loss if the leases are annulled. The parties who call upon the court to vacate or modify the order of October 19, 1885, waited until the final judgment of the Court of Appeals before moving. They deny that they knew of the order until after the final decision in the case. But they knew that the houses were in the occupation of tenants after May 1, 1886, and must have known that it was under some arrangement with the receiver. We think the court was authorized to award indemnity out of the fund arising on the sale under the judgment in partition, for any damages to the lessees, as a condition of granting the motion, and that nothing less will satisfy the claims of justice. We are of opinion that the order of the General and Special Terms should be affirmed, with a modification, however, declaring that the damages when ascertained shall be paid out of the fund reserved under the order of the court.

All concur.

Ordered accordingly.

On subsequent motion to amend remittitur the following order was handed down :

Ordered. That the remittitur herein be amended by inserting after the word "ascertained," the words "with the expenses of the reference," and also by inserting a provision further modifying the order of the General Term by striking out the award of costs and disbursements against the appellants.

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MICHAEL SULLIVAN et al. v. JAMES MILLER et al.

In Matter of the Petition of JOSEPH J. LITTLE et al., Appellants, v. JOHN F. AMES, Receiver, etc., Respondent.

In January, 1883, M. made an assignment for the benefit of creditors. Among the property assigned were certain stereotype and electrotype plates then in the possession of L. & D., as custodians for M., upon which was a chattel mortgage, which was not filed until the day of the execution of the assignment. In March, 1883, L. & D. recovered a judgment against M. for a debt accruing prior to January, and attempted to levy upon the plates by virtue of an execution issued thereon. By an order made in this action the assignee was removed and a receiver, *pendente lite*, of the assigned property appointed. In proceedings instituted by the receiver against L. & D., who had refused to deliver up the plates, it was adjudged that said firm had no lien, and that the receiver was entitled to possession. The plates were thereupon, and previous to July, 1883, delivered to the receiver. In March, 1884, the receiver applied *ex parte* for directions as to the disposition of the property, and an order was thereupon made directing a sale of the plates and payment of the mortgage debt out of the proceeds; this the receiver did. In November, 1884, L. & D. petitioned to have the *ex parte* order vacated so far as it directs the payment of the mortgage. *Held*, that the petition was properly denied; that as, at the time of the sale, L. & D. had no lien upon the property, their remedy, if any, was to obtain an order of the court directing as to the disposition of the proceeds, and until this was done it was the duty of the receiver to proceed under the order of the court; that when the mortgage became payable the mortgagee, in the absence of fraud, became entitled, as against the mortgagor and his representatives, and all other persons who had not acquired liens, to demand, receive and sell the mortgaged property; that after waiting a reasonable time to enable the petitioners to take steps, if they desired, to establish a right to the property, it was the duty of the receiver to apply for and take the directions of the court, and he was under no obligation to give notice to the general creditors; and that the petitioners having laid still from July, 1883, to November 1, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property, if they had any equitable interest (as to which *quære*), they had lost it by their laches.

The principles governing an accounting by an assignee under a general assignment control in such a case, and relieve the receiver from any liability for payments and disbursements made in good faith in the execution of the duties of his receivership.

108	635
117	398
108	635
127	59
108	635
129	910

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The general creditors of a mortgagor of chattels have no right to assail the mortgage as invalid until they have secured a lien thereon by a levy under judgment and execution, or in some way have acquired a legal or equitable interest therein.

(Argued June 23, 1887; decided October 4, 1887.)

APPEAL by Joseph W. Little and others, petitioners, from order of the General Term of the Supreme Court in the first judicial department, made June 1, 1886, which affirmed an order of Special Term denying an application of said petitioners, the nature of which, as well as the material facts, are stated in the opinion. (Reported below, 40 Hun, 516).

James R. Marvin for appellants. The mortgages not being filed until after the demands of Little & Co. had accrued, and the mortgagee not having taken possession of the property, rendered the mortgages void as to them, although their judgment was not recovered or their executions issued until after the mortgages were filed. (2 R. S., 136, §§ 9, 10; *Thompson v. Van Vechten*, 27 N. Y. 568; *Stewart v. Beale*, 7 Hun, 405; 68 N. Y., 629; *Parshall v. Eggart*, 54 id., 18; 11 Hun, 634; 52 id. 188; 77 id. 628; 34 id. 253; 35 id. 320; 17 id. 580; 52 id. 185; 12 Blatch. 548; 14 N. Y. 71; 57 Barb. 155; 32 N. Y. 457; 28 id. 45; 101 U. S. 739.) The execution issued to the sheriff without levy bound the property covered by the mortgages from the time of its delivery to the sheriff. (27 N. Y. 217; Code of Civ. Pro., §§ 1404, 409.) Knox and the receiver stand in the same position that Miller stood. They acquired no rights that he did not possess. They took the mortgaged property subject to the rights, legal and equitable, of Little & Co. (37 Barb. 185; 32 id. 322; 2 Hilt. 275; 14 Abb. Pr. 112; *Steward v. Beale*, 7 Hun, 405, 421; 17 N. Y. 28; id. 580, 584; 12 Blatch. 548; *Mitchell v. Winslow*, 2 Story, 492; Burrill on Assignments, § 391; *Stewart v. Platt*, 101 U. S. 739; 95 id. 764; *Van Hoesen v. Radcliffe*, 17 N. Y. 580; 1 Keyes, 203, 213; 4 Duer, 107; 23 Barb. 653.) Under chapter 314, Laws of 1858, a general assignee, or receiver

Statement of case.

acting for creditors, can impeach transfers of property of their assignor for fraud, but for fraud only. (*Collins' Case*, 12 Blatch. 548; *Stewart v. Platt*, 101 U. S. 739; 7 Hun, 238; 26 id. 353; 72 N. Y. 424.) The creditor may assert his remedy given by the statute against an unfiled mortgage whenever he shall have obtained his judgment. (27 N. Y. 568.) The right of Little & Co. to assail the mortgages of Masterson is given by statute. The right given is absolute and admits of no qualification, and cannot be defeated by any act of the mortgagor. (*Niagara Co. B'k v. Lord*, 33 Hun, 564.) Little & Co. could not levy upon the property and take it from the receiver's possession and sell it, but they had a right to come into a court of equity and assert their right to have sufficient of the proceeds of the mortgaged property, realized by the receiver from its sale, applied to the satisfaction of their judgment. (*First Nat. Bk. of Oswego v. Dunn*, 97 N. Y. 149; *Stewart v. Beale*, 7 Hun, 421; 68 id. 629.) The appointment of the receiver merely preserved and secured the property of the debtor Miller for his creditors. (*Mirich v. Selden*, 36 Barb. 15, 21; 77 N. Y. 58; 8 Daly, 162; 29 Barb. 68; 4 Hun, 71; 3 Kern. 556; 43 How. 492; 12 Abb. N. S. 427; 35 N. Y. 560; 53 id. 461; 37 Barb. 225; 1 Abb. 274; 10 How. 481; 28 id. 337; 31 N. Y. 631, 635; 7 Paige, 65.) The proper remedy of Little & Co. is by a motion in the suit in which the receiver was appointed. (60 N. Y. 92; 65 Barb. 275; 71 N. Y. 225; 79 id. 271; 4 Paige, 374; 1 id. 269; 14 Hun, 8; 14 W. Dig. 241; 36 Barb. 15; 48 N. Y. 62; 10 Hun, 89; 72 N. Y. 170; *Hazard v. McFarland*, Seld. Notes, 248.) Little & Co. are not precluded from enforcing their claim by the statute of 1858. (37 Barb. 185; 32 id. 322; 2 Hilt. 275; 14 Abb. Pr. 112; 7 Hun, 405, 421; 17 N. Y. 28; *Steward v. Platt* 101 U. S. 739; 12 Blatch. 548; 7 Hun, 238.) Having notice it was the duty of the receiver, before paying over the money to the mortgagee, to have brought Little & Co. into court and had their rights adjudicated, and for this neglect of his duty he is personally liable. (4 Hun, 373; *Moulton v. McCarthy*, 6 Robt. 470; *Annis v. Upton*, 66 Barb. 370; *Hitt*

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v. *Rusch*, 22 Ala. 563; Greenlf. Ev. 381, § 375.) Notice to the receiver's agent and his attorney and counsel was effectual as a notice to the receiver. It does not matter in what manner the receiver got the notice, so long as he had it. (6 Seld. 184; 72 N. Y. 89; 52 id. 280; 2 Hill, 464; 12 John. 306; 3 Barb. 529.)

Thomas D. Robinson for respondent. Upon making the assignment for the benefit of creditors, Miller placed his property beyond their reach. Their status as creditors then became fixed, and nothing they could afterwards do could alter their rights. The assignee is governed by the express terms of the trust. (*Nicholson v. Leavitt*, 6 N. Y. 519.) The assignment is both his guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. Control of the court over his actions is limited in the same way. (*In re Lewis*, 81 N. Y. 424.) The chattel mortgages were valid between the parties without being filed, and they were filed long before the appellants recovered their judgment, and are good against them until set aside. (*Bostwick v. Monck*, 40 N. Y. 387; *Spring v. Short*, 90 id. 538.) The question whether the receiver had notice of a claim of lien from the appellants, being a question of fact arising upon conflicting evidence, cannot be reviewed in this court. (Code of Civil Pro. § 1337.)

RUGER, Ch. J. The petitioners, Little & Demorest, commenced these proceedings to vacate and annul an order previously made in this action, which authorized Ames, the receiver, to sell certain property and pay the liens thereon, and to obtain an order requiring the receiver to pay the amount of a judgment recovered by them against Miller. The relief sought by the petitioners was denied by the Special Term, and, upon appeal, its order was affirmed by the General Term, whereupon this appeal was taken.

The situation out of which the controversy arose is substantially as follows: On the 4th of January, 1883, Miller,

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being in embarrassed circumstances, made a general assignment of his property to Knox for the benefit of his creditors. Among the property thus assigned were certain stereotype and electrotype plates, then in the possession of Little & Demorest, as custodians for Miller, and the eventual appropriation of the value of which is the subject of controversy in this proceeding. In July, 1882, these plates were mortgaged by Miller to one Masterson to secure the payment, one year from date, of \$6,500, borrowed money, and providing for the possession of the property by Miller until default in the payment of the mortgage. This mortgage was not filed until January 4, 1883, the day upon which Miller executed his general assignment. It is not claimed that either the assignment or the mortgage were fraudulent in fact, but it is alleged that the mortgage is void, as against creditors and *bona fide* purchasers, for want of filing at the time of its execution.

In March, 1883, Little & Demorest recovered judgment against Miller for an indebtedness accruing between July, 1882, and January, 1883, and in March, 1883, attempted to levy upon the plates under an execution issued upon such judgment. Knox having committed some violation of his duty, as assignee, was, by an order of the court in this action, on February 19, 1883, removed from his position, and Ames was thereupon appointed receiver, *pendente lite*, of the property covered by the assignment. After Ames' appointment he attempted to obtain possession of the plates from Little & Demorest, but they refused to give them up, claiming to hold them under the levy made by the sheriff upon their execution; and when this claim was adjudged against them still claimed to hold them under a lien for storage. Both of these claims were duly presented to the court in proceedings instituted by Ames, as receiver, against Little & Demorest and the sheriff of New York, to recover possession of the property; and it was adjudged in such proceedings that Little & Demorest acquired no lien upon it by virtue of the levy under their execution or otherwise, and that the receiver was

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entitled to the possession of the property by virtue of the assignment and his appointment as receiver. These orders, were not appealed from and the questions therein decided are *res adjudicata* between the parties to this proceeding.

The plates in question were, previous to July, 1883, delivered by the petitioners to the receiver, and he thereafter held them as a part of the assigned estate. The adjudications referred to were made previous to July, 1883, and after that time, no further attempt was made by Little & Demorest to establish a lien upon the property or to reach the proceeds of its sale until the commencement of these proceedings in November, 1884. In March, 1884, Ames applied *ex parte* to the court for its direction as to the disposition of this property upon a petition showing that it was of greater value than the amount of the lien upon it, and that its further retention by him would entail large expense upon the estate. The court, on March 15, 1884, made the order, which this proceeding sought to vacate, directing him to sell it for a sum not less than \$7,800, and to pay the mortgage debt out of such proceeds. The receiver thereupon sold the property at public sale, and from a portion of the proceeds paid the amount of the mortgage debt to Masterson, the mortgagee.

It is claimed by the appellants that the receiver could not do this in good faith, as he had been notified of their claim and the grounds upon which it was based. A written notice to this effect was claimed to have been served upon Ames on July 6, 1883, but the receiver disputed the fact of its service. The question whether the notice had been served was made the subject of a reference by the court upon the hearing of this proceeding, and was the principal one litigated in that court. Much evidence was given on both sides of the question, the receiver Ames testifying positively that such a notice had never been served. Upon this disputed question of fact the referee found that the evidence did not establish the service of the notice. This report was confirmed by the court, and the facts found thereby are not open to controversy here.

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The petitioners insist on this appeal that they are entitled to have the order of March 15, 1884, vacated so far as it directs the payment of the Masterson mortgage, and to have an order made directing the receiver to pay them the amount of their judgment. We do not think they were entitled to the relief demanded. The order which they ask to set aside has already been executed by the receiver, the property has been sold under it, and the proceeds paid over under the direction of the court in good faith by the receiver. The effect of the order asked for, if granted, would be to charge the receiver with the payment of the petitioners' judgment and entail upon him the loss of that amount. At the time of the sale of this property by the receiver, the petitioners had acquired no lien, either legal or equitable, upon it, and no legal right to demand of the receiver the payment of their judgment. The remedy of Little & Demorest, if any they had, was to obtain the order of the court directing the disposition of the proceeds of the fund. Until this was obtained it was the duty of the receiver to proceed in the execution of the duties of his office and convert the assigned estate into money and pay out the proceeds under the direction of the court. (*Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 375.) The general creditors of a mortgagor of chattels have no right to assail a mortgage, or other conveyance of property made by him, as invalid until they have secured a lien thereon by levy under a judgment and execution, or, by some other method, acquired a legal or equitable interest in the property. (*Southard v. Benner*, 72 N. Y. 426; *Geery v. Geery*, 63 id. 256.) Until such lien is acquired, the receiver holds the property subject to the order of the court and liable to pay the proceeds thereof to the person designated by it. At the time of his assignment Miller had an assignable interest in the property, and the assignee took the legal title to it subject to the payment of the liens thereon; and upon the appointment of the receiver that officer succeeded to the rights, and became subject to the duties of the assignee, so far as he was directed

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by the court to perform them. When the mortgage became payable, in July, 1883, the mortgagee became entitled, as against the mortgagor and his representatives, and as against all other persons who had not acquired liens thereon, to demand and receive possession of the mortgaged property and the right to sell it, and apply the proceeds of its sale to the payment of his debt. The receiver could not successfully resist the claim of Masterson to the possession of the property, or a proceeding on his part to enforce payment of the mortgage debt. After awaiting a reasonable time for the petitioners to take steps, if they desired to do so, to establish a right to the property in question, it was the plain duty of the receiver to apply and take the direction of the court as to the disposition to be made of the property in his hands, and he was under no obligation to give notice to the general creditors of Miller of such application. (*Herring v. N. Y., L. E. & W. R. R. Co., supra.*) The legal title and all of Miller's interest in the property passed by the assignment to the assignee, and upon his removal, to the receiver of the court; and if he was debarred for any reason from disputing the validity of the Masterson mortgage, it furnished no foundation for the claim of Demorest & Little to take possession of the property. The property was then in the custody of the law and was not subject to levy upon a judgment against the mortgagor, and this was adjudicated in the orders referred to. If there were creditors of Miller, who supposed themselves entitled to make equitable claims to any portion of the assigned estate in the hands of the receiver, it was their privilege to bring them to the attention of the court, upon proper notice to the parties to be affected thereby, and obtain its adjudication upon their claims and its order authorizing their enforcement. The petitioners have never, however, attempted to bring Masterson, whose interests in the property they assail, into court, or to obtain any order affecting his claim to the proceeds of the mortgaged property; and they occupy the same position in respect to it that other general creditors of Miller hold. They laid still

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from July, 1883, until November, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property in question, and we think they were then too late to do so successfully. It is quite true that previous to July, 1883, the petitioners had asserted rights as to the property in question, but those rights were duly litigated between the receiver and the petitioners and adjudicated against the petitioners, and the receiver had no adequate reason for supposing that they intended to assert any other or further claim in such property. Under these circumstances, and without haste, the receiver proceeded in the performance of his duties and sold the property and paid out the proceeds in good faith, under the order of the court, to the person apparently entitled to them. There is no principle of law or equity upon which he can be compelled to pay them again.

It is not our intention to discuss the question whether the petitioners had at any time an equitable claim which might have been enforced against this property, but we do hold that if they ever had such claim they have lost it by reason of their laches. The principles governing accountings by an assignee under a general assignment control this case and relieve the receiver from any liability for payments and disbursements made by him in good faith in the execution of the duties imposed upon him by his receivership. It is said in *Young v. Brush* (28 N. Y. 671) that "it is thought to be well settled that a trustee, while acting under a general trust, is entitled to be allowed for all disbursements for taxes, repairs, salaries, insurances, and for all other charges and expenses which he, in good faith, thinks proper to pay." In *Wakeman v. Grover* (4 Paige, 23) it was held: "If assignees under an assignment which is fraudulent in law, pay over the proceeds of the assigned property to creditors of the assignor in pursuance thereof, before any creditors obtain a general or specific lien on the assigned property, the other creditors cannot compel the assignee to account to them for such proceeds." The head-note in *Ames v. Blunt* (5 Paige 13) states the rule to be that, "although an assignment for the benefit

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of creditors is fraudulent as to those who do not assent to it, the assignees are not answerable for the proceeds of assigned property actually paid to *bona fide* creditors of the assignor, pursuant to the assignment, before any others have obtained either a legal or equitable lien on such property or the proceeds thereof."

The doctrine of these cases has been frequently applied in subsequent cases in the courts of this State (Bishop on Insolvent Debtors, § 229), and the case in hand is within the principle there laid down. The receiver in this case had authority, and it was his duty, to redeem the property in question from the lien of the Masterson mortgage and apply the surplus thus obtained to the purposes of the trust. Such mortgage was a valid lien thereon as against him, and could be assailed only by such creditors of the mortgagor as had acquired a lien upon the property, or some footing in regard thereto which gave them a right to contest the question of its validity. The receiver was under no obligation to institute such a contest, and could safely proceed in the execution of his trust until restrained by some order of a court having jurisdiction over him.

We are, therefore, of the opinion that the orders of the courts below should be affirmed, with costs.

All concur.

Orders affirmed.

Statement of case.

JOHN HONE, as Executor, etc., Respondent, v. JOHN WATTS DE PEYSTER, Individually and as Executor, etc., Appellant.

An action by an executor upon a claim, alleged to be due the estate, arising out of transactions between the testator and another, must be brought by the executor as such; it is not maintainable by him in his individual capacity.

In such an action the executor, unless mismanagement or bad faith is shown, is not chargeable individually with costs. (Code of Civil Pro. § 246.)

The rule is not changed by the fact that the executor is beneficially interested in the estate as residuary legatee.

It is the duty of the court, in an action brought by an executor as such, to determine the question as to his individual liability for costs, in case he is defeated; and where he is by the judgment charged with costs in a representative capacity alone, this impliedly determines that he is not liable individually; the decision is final and conclusive unless it is subsequently reversed or set aside by a direct proceeding for that purpose.

He may not, therefore, be charged with such costs in a collateral proceeding. *Hone v. De Peyster* (44 Hun, 487), reversed.

(Submitted June 23, 1887; decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 13, 1887, which modified, and affirmed as modified, an order of Special Term. (Reported below, 44 Hun, 487.)

The substance of the two orders, and the facts pertinent thereto, are set forth in the opinion.

G. H. Brewster for appellant. If the plaintiff's testatrix ever had a right to recover the moneys sued for by him, she was barred by the statute of limitations before her death, which was in 1869. Whatever moneys her husband received from her were received before 1848, and became his by virtue of his marital rights. (*Hone v. De Peyster*, 3 How. Pr. [N. S.] 422; 103 N. Y. 662.) If plaintiff had a cause of action, it accrued to him personally under his mother's will, and it is immaterial whether it arose before or after her death. (*Brockett v. Bush*, 18 Abb. Pr. 337; *Butler v. B. & A*

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R. R. Co., 24 Hun, 99; *Holdridge v. Scott*, 1 Lans. 303; *Bedell v. Barnes*, 29 Hun, 589; *Cummings v. Egerton*, 9 Bosw. 684.)

G. H. Crawford for respondent. Plaintiff was obliged to bring this action as executor, by section 1814 of the Code. (*Ketchum v. Ketchum*, 4 Cow. 89; *Goldthwayte v. Petrie*, 5 T. R. 234; *People v. Judges*, 9 Wend. 490; *Brockett v. Bush*, 18 Abb. Pr. 337; *Woodruff v. Cook*, 14 How, 481; *Fox v. Fox*, 5 Hun, 53; *Bedell v. Barnes*, 29 id. 589.)

RUGER, Ch. J. Maria A. Hone, the plaintiff's testatrix, intermarried with Frederic De Peyster, the defendant's testator, in 1839. In 1869 she died leaving her husband surviving, and having by a last will and testament bequeathed to him all of her property, both real and personal, for life, and after his death a legacy of \$10,000 to the plaintiff, her son, and the remainder of her property to be equally divided between John Hone and his sister, Emily Foster. By the will Frederic De Peyster was made sole executor and John Hone was named as successor in case of his death. Frederic De Peyster died in 1882, and thereafter the plaintiff took upon himself the execution of the will. The only property received by the plaintiff under the will consisted of a house and lot in New York, valued at about \$20,000, and a claim against Frederic De Peyster's estate for property belonging to his wife, which had at some time been converted by him to his own use.

Claiming that Frederic De Peyster was liable to his wife's estate for the value of the property thus converted, the plaintiff brought this action, as the representative of such estate, to enforce the collection of the claim against De Peyster's executor. It was finally determined in this court that Frederic De Peyster, having married Maria A. Hone previous to the enactment of the statutes relating to the rights of married women, became, under his marital rights, entitled to so much of her personal property as he had reduced to possession before his death, and that the action could not be maintained.

Upon the trial of the action before the referee the defendant had judgment, and it was therein directed and adjudged that he recover of "John Hone, as executor of the last will and testament of Maria A. De Peyster, deceased, the sum of \$902.41" costs. The plaintiff having appealed from this judgment to the General Term, it was reversed and a retrial of the issues ordered. From this order the defendant appealed to this court where the order of the General Term was reversed and the judgment entered upon the report of the referee was affirmed with costs against "John Hone as executor of the last will and testament of Maria A. De Peyster, deceased." Final judgment was rendered upon the remittitur from this court against "John Hone as executor, etc., for the sum of \$359.91" costs and for an affirmance of the original judgment. A petition was then presented by the defendant's executor for the purpose of charging John Hone personally with the payment of the sums adjudged as costs in the action. An order was made at Special Term requiring the plaintiff personally to pay such costs, upon the ground that he brought the action unnecessarily in his name as executor. It was there held that the action was maintainable by him individually, and that it was an evidence of bad faith that he had not thus brought it. We think the court erred in supposing that the action was maintainable by Hone in his individual capacity. The claim sued for was one alleged to be due the estate which he represented, by virtue of transactions taking place between his testatrix and the defendant's testator while both were alive. The cause of action never accrued to him individually, and he had no connection with it except so far as it constituted an asset of the estate he represented. The amount, if any, recoverable in that action would have come into his hands in his representative capacity, and have been subject to disbursement and distribution as a part of the estate. No devise or bequest of specific property was made in the will, and the legatees did not take title to the property disposed of as owners, but their interest therein was that of residuary legatees of an indefinite sum to be determined by the process of administration.

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The General Term, however, did not concur in the view adopted by the Special Term, and reversed its order so far as it was based upon the element of bad faith, but held that the plaintiff was chargeable with one-half of the costs, upon the ground that he was beneficially interested in the recovery to that extent.

We cannot adopt the conclusions arrived at by either of the courts below in charging the plaintiff with costs. The action was necessarily brought in the name of the executor, and he represented other interests than his own in its prosecution. If he had failed to collect any of the assets of the estate which were collectible he would have been liable to the residuary legatees for their share of the amount lost by his neglect. The cause of action prosecuted against the defendant was not divisible, and his duty required him to pursue it in the only way in which it was sustainable, and that was in his capacity as an executor. The statute regulates the liability which executors assume for costs in prosecuting or defending such an action, by providing that they shall be chargeable exclusively upon the estate or fund represented unless the court directs them to be paid by the party personally for mismanagement or bad faith in the prosecution or defense. (§ 3246, Code of Civ. Pro.)

The General Term having reached the conclusion that there was no evidence of bad faith on the part of the plaintiff in the prosecution of the action, there remains no ground upon which, under the statute, any part of the order of the Special Term can be sustained.

We are also of the opinion that the express adjudications of the trial and appellate courts upon the subject of costs, debarred the defendant from again raising the question as to the fund or person chargeable with their payment. The judgments of these courts in favor of the defendant, as entered by him, charged the plaintiff, in his representative capacity alone, with the payment of such costs. It was not only competent for these courts, but it was their duty, to determine the question whether the executor was liable, personally, for

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such costs or not; and they have, by charging him in his representative capacity alone, impliedly determined that he was not liable individually. We know of no authority by which a collateral attack upon such an adjudication is authorized, and are of the opinion that when the liability for costs depends upon the conduct of the party to the litigation during its prosecution, the determination of the court in the action upon such a question is final, unless it is subsequently reversed or set aside by a direct proceeding for that purpose. (*McGregor v. Buell*, 3 Abb. Ct. App. Dec. 86; *Sheridan v. Andrews*, 80 N. Y. 648.)

The orders of the Special and General Terms should, therefore, be reversed, and the prayer of the petitioner denied, with costs.

All concur.

Ordered accordingly.

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MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

ELIZABETH A. L. HYATT, Respondent, *v.* THE DALE TILE
MANUFACTURING COMPANY (LIMITED), Appellant.

(Argued April 20, 1887; decided June 7, 1887.)

THIS case, in its general and material features, was similar
to and was decided on authority of *Marston v. Swett* (66
N. Y. 206; 82 N. Y. 526.)

Edward D. McCarthy for appellant.

George W. Van Slyck for respondent.

PECKHAM, J., reads for affirmance.

All concur.

Judgment affirmed.

JOSE THETA, Respondent, *v.* THE VILLAGE OF MIDDLETOWN,
Appellant.

AN erroneous ruling, excluding testimony affecting only the credibility
of a witness, is not a ground for reversal, where it appears that the
evidence of the witness was wholly immaterial.

(Argued May 4, 1887; decided June 7, 1887.)

THIS action was brought to recover damages for personal
injuries alleged to have been caused by defendant's negligence
in not removing an obstruction in one of its streets.

The following is the *mem.* of opinion therein :

"The exception taken by the defendant's counsel to the
ruling of the trial court excluding an answer to his question, on

cross-examination, to the plaintiff's witness as to whether he was engaged to the plaintiff or not, was undoubtedly well taken. It is always competent to inquire what relations exist between a party and his witness, for the purpose of showing the motive and influence under which the evidence is given, and the existence of any bias or prejudice on the part of the witness. Such evidence, however, affects the credibility of the witness only, and if his evidence is wholly immaterial upon all of the material issues of the case an erroneous ruling upon such question furnished no valid reason for reversing the judgment. That was the case here. No material question of fact was controverted on the trial, and the evidence of the witness could have been wholly stricken from the minutes without affecting the result in the least degree.

"The defendant was not prejudiced by the ruling and the judgment should, therefore, be affirmed."

William F. O'Neil for appellant.

William Vanamee for respondent.

Per Curiam mem. for affirmance of judgment.

All concur.

Judgment affirmed.

JOSHUA J. TOWLE, Respondent, *v.* THE SPRINGFIELD FIRE
AND MARINE INSURANCE COMPANY, Appellant.

(Submitted May 4, 1887; decided June 7, 1887.)

C. D. Murray for appellant.

Walter L. Sessions for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARGUERITE SELVI, Respondent, v. LOUIS HARRISON et al.,
Appellants.

(Argued May 4, 1887 ; decided June 7, 1887.)

Albert Hessberg for appellants.

Benj. M. Stilwell for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JACOB ROMBERG, Appellant, v. MINNIE TOBIAS et al.,
Respondents.

(Argued May 4, 1887 ; decided June 7, 1887.)

Henry Wehle for appellant.

Nathaniel C. Moak for respondents.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

PEOPLE ex rel. HELEN FAIRCHILD, as Administratrix, etc.,
Appellant, v. THE COMMISSIONERS OF THE DEPARTMENT OF
FIRE AND BUILDINGS IN THE CITY OF BROOKLYN, Respondent.

(Argued June 7, 1887 ; decided June 14, 1887.)

Edward F. O'Dwyer for appellant.

Almet F. Jenks for respondent.

Agree to affirm orders of General and Special Terms and
proceedings of commissioners appealed from reversed on the
case of *People ex rel. Peck v. Same Defendants* (ante p.64).

All concur ; no opinion.

Orders affirmed.

MARY M. BOYLE v. JOSIAH W. BOYLE, HENRY J. WELCH,
Claimant, Respondent, ANNIE L. McCahill, Appellant.

106	654
187	540

A bond of indemnity given by an administrator to the sureties on his bond was conditioned to save the obligees "from any loss or error which might arise from or be caused by said administration." The administrator settled his accounts and was discharged. *Held*, that the bond did not cover expenses incurred by the obligees in an effort to be discharged as sureties, or in an effort, on their part, to compel the administrator to account.

(Argued June 7, 1887; decided June 14, 1887.)

THIS was an action for partition. The premises were sold and the questions presented here arose between claimants to the share of defendant Mansfield in the proceeds. A reference was had to determine their respective priority, in which it was decided that Andrew J. Rogers had the first lien, Henry J. Welch, the second lien, and the appellant Annie L. McCahill, the third lien. The claimant McCahill filed exceptions to the report of the referee, which were overruled at Special Term. The General Term affirmed the order.

Mr. Rogers, one of the claimants, was employed as attorney for Mansfield in the action. It appears that it was agreed between Mansfield and the claimant that his compensation should be \$400, payable out of the proceeds of Mansfield's interest after deducting such allowance as the court should make to him in the way of costs. An allowance of \$150 was made, which Rogers credited upon the \$400 to be paid under the agreement, and the referee found that he has a lien for the remaining \$250 upon the fund in court.

Mr. Welch claimed a lien upon the fund by virtue of an assignment executed by Mansfield. Welch was one of the sureties on the bond of Mansfield as administrator. To indemnify the sureties, Mansfield gave to them his bond, and executed to them an assignment of his interest in the proceeds of sale in the partition suit. The material portions of the bond of indemnity and of the assignment are set forth in the opinion. Some time after the appointment of Mansfield, as administrator, Welch and his co-surety, presented a petition, under

section 2600 of the Code, to be relieved from liability as sureties, and upon this petition the surrogate issued a citation requiring Mansfield to show cause why he should not put in new sureties. Mansfield failed to appear or put in new sureties, and the surrogate made a decree, relieving the sureties from future breaches, revoking the letters issued to Mansfield, and directing him to account. He did not file an account within the time required by surrogate, and an attachment was issued against him, and he was arrested and brought into court. He then filed an account, showing that he had properly discharged his duties as administrator. This account was settled and allowed by the surrogate, and Mansfield discharged as administrator. Welch showed that he paid out about \$200 in disbursements, and became liable to his attorneys for \$300. Mansfield had confessed judgment to him for \$500 damages, and sixteen dollars and seventy-one cents costs, making his claim for \$516.71 stated in order of confirmation. Mrs. McCahill's claim is upon a loan of \$1,000 made to Mansfield as security, for which she took an assignment of the interest of Mansfield in the suit in partition and the proceeds, which was subsequent to the assignment to Welch.

The following is the *mem.* of opinion :

Per Curiam. We are satisfied with so much of the order appealed from as directs that the claim of Mr. Rogers, as attorney in the partition suit, shall be first paid out of the proceeds in the hands of the court. But we are not satisfied with the priority awarded to Welch, he was surety upon Mansfield's bond as administrator, and to protect him against that liability the assignment relied upon was made. But no such liability ever occurred. Mansfield in the end settled his accounts and was discharged, and the decree shows that he paid out in funeral expenses more than the whole amount of the estate. Welch's loss did not come from his liability on the bond, but first from his effort to be discharged as surety for which Mansfield was not accountable; and, second, from his own interference in an endeavor to make Mansfield account. The expenses he incurred were the product of his own fears, and not contemplated by the indemnity or fairly

within its terms. While its language is quite broad, it plainly does not cover an expenditure not created by the suretyship, but by his own hostile endeavor to be rid of it. The purpose is stated to be to guard the bondsmen "from any loss or error that might arise from or be caused by said Mansfield's administration of said personalty." There was no such loss. The administration resulted in none. It came from Welch's fears that there might be one, and his own voluntary action and expenditure. The language expressing what is to be paid out of the share assigned is "such loss, expense, sum or sums of money as the said Henry J. Welch and Patrick J. Evans may incur or be put to from any loss, error, mishap or cause whatsoever in relation or regard to their suretyship on the said bond." Here again is contemplated some loss flowing from liability as surety, and which is incurred or put upon them from that cause. It is expressed again "for any loss or expense they or either of them sustain or incur by reason of their suretyship on my said bond." No such loss occurred. Welch could have remained surety and relied upon his indemnity. He chose not to do so. He sought to be relieved from the risk. That was his privilege, but the cost of it was not within his indemnity. He incurred further expenses in hostility to Mansfield. The result proved they were needless. Welch has his judgment against Mansfield, but is not entitled to be paid in preference to Mrs. McCahill.

"So much of the order as gives him that preference should be reversed; the order modified so as to give Mrs. McCahill preference in payment next after Rogers; no costs of this appeal to be allowed either party."

De Witt C. Brown for appellant.

James C. De La Mare and *John W. Goff* for respondent.

Per Curiam opinion for reversal of so much of order as gives Welch a preference, and order modified so as to give Mrs. McCahill a preference in payment next after Rogers.

All concur.

Ordered accordingly.

THOMAS CANABY, Respondent, *v.* EDWIN KNOWLES et al.,
Appellants.

(Argued June 7, 1887; decided June 14, 1887.)

George W. Wingate for appellants.

W. Bourke Cockran for respondent.

Agree to dismiss appeal; no opinion.
All concur, except EARL, J., dissenting.
Appeal dismissed.

IRA LEO BAMBERGER, Respondent, *v.* HERMAN N. DUDEN,
Appellant.

(Argued June 7, 1887; decided June 17, 1887.)

Blumenstiel & Hirsch for appellant.

Ira Leo Bamberger, respondent, in person.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

SAMUEL C. REED, Respondent, *v.* FRANCIS E. TROWBRIDGE,
Appellant.

100c 657
144 608

Where the cause of action stated in a complaint, which was for more than \$500, was put in issue and contested on the trial and was allowed by the jury, but the recovery was for less than that sum because of the application of an undisputed counter-claim. *Held*, the amount in controversy was for more than \$500, and the case was appealable to this court.

(Argued June 7, 1887; decided June 14, 1887.)

THIS was a motion to dismiss an appeal from a judgment on the ground that the amount in controversy was less than \$500.

The following is the *mem.* of opinion :

"The amount in controversy is the sum of \$1,465.47, which the jury allow to the plaintiff. His right to receive that sum was strenuously disputed and resisted by the defendant. The jury gave the plaintiff a verdict of only \$200.47; but that balance was reached, by applying in diminution of the \$1,465.47, the undisputed counter-claim of the defendant, amounting to the sum of \$1,265; but for the allowance by the jury of the \$1,465.47, the defendant would have had judgment for his counter-claim. The matter in controversy, therefore, under section 191 of the Code, is more than \$500, and the case is appealable to this court.

"Motion denied, with \$10 costs."

Theodore F. Miller for motion.

D. M. Porter opposed.

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
GEORGE W. EVANS, Respondent.

(Submitted June 7, 1887; decided June 14, 1887.)

C. S. Lester for motion.

McKenzie Semple opposed.

Motion to dismiss appeal granted; no opinion.

All concur.

Appeal dismissed.

WILLIAM CURRY, Respondent, *v.* ELIZA HENRY et al.,
Appellants.

(Argued April 25, 1887; decided June 14, 1887.)

F. E. Dana for appellants.

Thomas J. Tilney for respondent.

Agree to affirm; no opinion.

All concur, except RUGER, Ch. J.; RAPALLO and DAN-
FORTH, JJ., dissenting.

THOMAS HARBISON, Appellant, *v.* PHILIP VAN VALKENBURGH
et al., Respondents.

(Argued June 6, 1887; decided June 14, 1887.)

Nathaniel C. Moak for appellant.

Edward C. James for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

PAUL CUSHMAN, as Trustee, etc., Respondent, *v.* CHARLES E.
LELAND, as Trustee, etc., Respondent, JENNIE E. RICHARD-
SON et al., Appellants.

(Argued June 6, 1887; decided June 14, 1887.)

J. H. Clute for appellants.

Nathaniel C. Moak for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES A. DEERING, Respondent, v. THOMAS J. McCABILL,
Appellant.

(Argued June 6, 1887; decided June 21, 1887.)

De Witt C. Brown for appellant.

D. J. Dean for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

REBECCA B. MARTIN, Respondent, v. WILLIAM F. GARRISON,
Appellant.

(Argued June 9, 1887; decided June 28, 1887.)

Joseph A. Burr, Jr., for appellant.

Isaac S. Catlin for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

DAVID A. SCOTT et al., Respondents, v. AUGUSTUS L. CASE
et al., Appellants.

(Argued June 13, 1887; decided June 28, 1887.)

William H. Harris for appellants.

Henry Bacon for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN ROBISON, Respondent, *v.* OTTO HUBER, Appellant.

(Submitted June 14, 1887; decided June 28, 1887.)

A Simis, Jr., for appellant.

Foster L. Backus for respondent.

Agree to affirm ; no opinion.

All concur

Judgment affirmed.

JOSEPHINE MYERS, Respondent, *v.* GEORGE S. RILEY,
Appellant.

(Argued June 14, 1887; decided June 28, 1887.)

F. L. Durand for appellant.

Thomas Raines for respondent.

Agree to affirm on opinion in *Reilley v. Delaware and Hudson Canal Company* (102 N. Y. 383.)

All concur.

Judgment affirmed.

ELIZA B. ANDERSON, Respondent, *v.* THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, Appellant.

The motion papers, on motion for reargument, should be sufficient to enable the court to determine whether the decision requires correction in any respect.

Where a case was decided here on a dissenting opinion in the court below, *held*, that on motion for reargument for alleged errors in that opinion the case on appeal containing the opinion should have been furnished.

(Submitted June 21, 1887; decided June 28, 1887.)

THIS was a motion for reargument.

The following is the *mem.* of opinion.

"This case was decided at Albany in April last, and the judgment was reversed, and a new trial granted, on the dissenting opinion of DAVIS, P. J., at General Term. Neither a copy of that opinion, nor a copy of the case is furnished on this motion, and we have them not now before us. It is said that there are some expressions in the opinion which may embarrass the plaintiff on the new trial ordered. We considered that, in the main, the opinion was correct. According to our memory, Judge DAVIS said that there was no time when the defendant could have maintained an action against the plaintiff for the premium after the risk had terminated, or something to that effect. The motion papers should be sufficient to enable us to determine whether our decision requires correction in any respect. We ought not to be supposed to carry about with us, after decision, the papers in the numerous cases which have been argued. The case on appeal, containing the opinion at General Term, should have been furnished. On the papers now presented, we see no reason for changing our decision, nor can we perceive any theory upon which the plaintiff can recover on the facts appearing on the first trial.

"The motion should be denied."

Mitchell & Mitchell for motion.

Thomas H. Hubbard opposed.

Per Curiam mem. for denial of motion for reargument.

All concur.

Motion denied.

ADDISON R. BALDWIN,, Appellant, v. ELMENDORF ROOD,
Respondent.

(Argued June 14, 1887; decided June 28, 1887.)

W. A. Sutherland for motion.

Turk & Barnum opposed.

Agree to grant motion to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GEORGE E. HYATT, as Receiver, etc., Respondent, v. WILLIAM
W. DUSENBURY et al., Appellants.

103	663
128	435

THIS was a motion to dismiss appeal from judgment. It was granted on the ground that the defendants, who appealed, had no interest in the matter in controversy, and so were not aggrieved and could not appeal. (Code Civ. Pro., § 1294.)

(Argued June 14, 1887; decided June 28, 1887.)

A. Walker Otis for motion.

Moody B. Smith opposed.

Per Curiam mem. for granting motion to dismiss appeal.

All concur.

Appeal dismissed.

MARY M. BAMPTON, Respondent, v. BROOKLYN CROSS-TOWN
RAILROAD COMPANY, Appellant.

(Argued June 16, 1887; decided July 1, 1887.)

James C. Bergen for appellant.

William N. Cohen for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

J. MARCUS BOORMAN, Appellant, v. SIMEON BALDWIN et al.,
Respondents.

(Argued June 7, 1887; decided July 1, 1887.)

J. M. Boorman for appellant.

Frank L. Hall for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM CHAPPELL, Respondent, v. THE ROCHESTER AND
PITTSBURGH RAILROAD COMPANY, Appellant.

(Argued June 20, 1887; decided July 1, 1887.)

Martin W. Cooke for appellant.

J. A. Stull for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER, Ch. J., and RAPALLO, J., not
voting.

Judgment affirmed.

WILLIAM B. SHEARMAN, by Guardian, etc., Respondent, v.
CHARLES D. POPE, Appellant.

Where, after an order requiring an infant plaintiff to file security for costs and staying proceedings until the order was complied with, and pending a motion to dismiss the complaint because of a failure to comply with the order, the court granted an order allowing plaintiff to prosecute the action as a poor person. *Held*, that the stay did not deprive the court of jurisdiction to make the second order; and that such order was an answer to the motion to dismiss.

(Argued June 21, 1887; decided July 1, 1887.)

THIS was an appeal from an order of General Term affirming an order of Special Term, which denied a motion on the part of the plaintiff to dismiss the complaint.

Defendant procured and served an order requiring plaintiff to file security for costs within ten days after service of the order, and staying proceedings until the order was complied with. Plaintiff having failed to comply with the order, defendant moved for a dismissal of the complaint. Pending the motion plaintiff procured an order allowing him to prosecute the action *in forma pauperis*; on production of this order the court denied the motion to dismiss.

The following is the *mem.* of opinion :

"*Per Curiam.* The same court which required the plaintiff to give security for costs subsequently made an order allowing the plaintiff to prosecute this action as a poor person. The stay of proceedings granted when the first order was made did not deprive the court of jurisdiction to make the second order, and that order was an answer to the motion to dismiss the complaint.

"The order should be affirmed, with costs."

John K. Kuhn for appellant.

F. J. Moissen for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

THE HONG KONG AND SHANGHAI BANKING CORPORATION,
Respondent, v. GUY B. SEELY et al., Appellants.

(Argued June 21, 1887; decided July 1, 1887.)

Flamen B. Candler for appellants.

Amasa A. Redfield for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

SICKELS — VOL. LXI. 84

THE FRANCKLYN LAND AND CATTLE COMPANY, Appellant,
v. AUGUST KOUNTZE et al., Respondents.

(Argued June 21, 1887; decided July 1, 1887.)

Nelson S. Spencer for appellant.

George W. Van Slyck for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

CORNELIUS W. H. ELTING, Respondent, v. CHARLES W.
DAYTON, Appellant.

(Argued June 21, 1887; decided July 1, 1887.)

Joseph F. Stier for appellant.

John J. Linson for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

HENRY O. ELY, Respondent, v. WILLIAM E. TAYLOR,
Appellant.

(Argued June 21, 1887; decided July 1, 1887.)

Jerry McGuire for appellant.

Edmund O'Connor for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

LYDIA A. GAGE, Respondent, v. THE VILLAGE OF HORNELLS-
VILLE, Appellant.

The provision of the Code of Civil Procedure (§ 3245), prohibiting the allowance of costs to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for money only, unless the claim was before the commencement of the action presented for payment to the chief fiscal officer of the corporation, does not apply to an action for the recovery of damages for injuries caused by the negligence of the servants of the corporation.

It seems that the chief fiscal officer of a village is its treasurer, not its board of trustees.

Baine v. City of Rochester (85 N. Y. 523) distinguished.

(Argued June 21, 1887; decided July 1, 1887.)

THIS was an appeal from order of General Term affirming an order of Special Term denying a motion for a retaxation of costs.

The action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence in omitting to keep a sidewalk on one of its streets in repair. Plaintiff recovered a judgment. Defendant objected to the allowance and taxation of costs on the ground that the claim was not presented before the commencement of the action to the village treasurer. Plaintiff proved the presentation of the claim to the board of trustees.

The following is the *mem.* of opinion.

"We held that cases for the recovery of damages for injuries sustained by reason of the negligence of the servants of a municipal corporation were not within the purview of section 2 of chapter 262 of the Laws of 1859. (*Taylor v. City of Cohoes*, 105 N. Y. 54.) The provisions of that section were substantially embodied in section 3245 of the Code. There is no such change in the language of the latter section as requires or will permit us to change our decision and construe it differently from the former section. We simply decided, in *Baine v. City of Rochester* (85 N. Y. 523), that under section 3245 a claim against a municipal corporation arising *ex contractu* must have been presented to its chief fiscal officer before the commencement of the action in order to entitle the plaintiff to costs, and thus actions *ex delicto* against municipal

106 667
119 153

corporations are left to stand as to costs upon the prior decisions.

"We do not agree that a claim against this municipality could, under the section of the Code, be presented to its board of trustees. The chief fiscal officer of such a corporation is the officer who receives, keeps and disburses the moneys of the corporation, and such an officer is the treasurer.

"The order should be affirmed with costs."

J. W. Near for appellant.

George N. Orcutt for respondent.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

I. TOWNSEND BURDEN, Respondent, *v.* JAMES A. BURDEN et al.,
Appellants.

(Argued June 21, 1887; decided July 1, 1887.)

Ezek Cowen and *R. A. Parmenter* for appellants.

E. Countryman and *H. A. King* for respondent.

Agree to dismiss appeal; no opinion.

All concur, except RAPALLO, J., not voting.

Appeal dismissed.

In the Matter of the Laying out and Opening of HAWTHORNE
AVENUE, IN THE CITY OF YONKERS.

(Argued June 22, 1887; decided July 1, 1887.)

James B. Ludlow for appellants.

Joseph F. Daly for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

FRANCES J. BYRNES, Respondent, v. MARIA L. LABAGH et al.,
MATTHIAS PLUM, Appellants.

(Argued June 22, 1887; decided July 1, 1887.)

William Pierrepont Williams for appellants.

John Henry Hull for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE ex rel. THE SEMINARY OF OUR LADY OF ANGELS,
Respondent, v. THOMAS M. BARBER et al., as Assessors,
etc., Appellants.

(Submitted June 22, 1887; decided July 1, 1887.)

Joel L. Walker for appellants.

Charles H. Piper, Sr., for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE BUFFALO LUBRICATING OIL COMPANY (Limited), Respond-
ent, v. THE STANDARD OIL COMPANY OF NEW YORK,
Impleaded, etc., Appellant.

THE SAME, Respondent, v. THE ACME OIL COMPANY,
Impleaded, etc., Appellant.

An action to recover damages caused by conspiracy may be maintained
against a corporation.

(Argued June 22, 1887; decided July 1, 1887.)

THESE actions were brought to recover damages alleged to have been caused by a conspiracy between the defendants to injure plaintiff. The two corporations defendant, demurred to the complaint on the ground that it did not state a cause of action as against them.

The following is the *mem.* of opinion :

“*Per Curiam.* We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy (*Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366 ; affirmed, 103 N. Y. 645 ; *Reed v. Home Savings Bank*, 130 Mass. 443 ; *Krulevitz v. Eastern R. R. Co.*, 140 Mass. 575 ; *Western News Co. v. Wilmarth*, 33 Kan. 510.) If actions can be maintained against corporations for malicious prosecution, libel, assault and battery and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited, that the malice and wicked intent needful to sustain such actions may be imputed to corporations.

“A careful scrutiny of the complaint in each action has convinced us that sufficient facts are alleged to show that the appellant was a party to the conspiracy set forth, and that sufficient facts are therefore alleged in the complaint to show a cause of action against it.

“The judgment should therefore be affirmed, with leave to the appellant to withdraw its demurrer and answer the complaint, upon payment within twenty days of the plaintiff’s costs subsequent to the interposition of the demurrer.”

George J. Sicard for appellants.

Adelbert Moot for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. THE CHURCH OF THE HOLY COMMUNION,
Appellant, v. THE ASSESSORS OF TAXES OF THE TOWN OF
GREENBURGH, Respondent.

106a 671
126 249

The act of 1880 (Chap. 269, Laws of 1880), providing for the review of assessments by *certiorari*, regulates that subject and renders inapplicable to such case the provision of the Code of Civil Procedure (§ 2120 *et seq.*), in reference to the writ of *certiorari*.

(Argued June 22, 1887; decided July 1, 1887.)

THIS was a proceeding under the Code of Civil Procedure (Chap. 16, art. 7), to review the action of the defendant in assessing the property of the relator.

The following is the *mem.* of opinion.

"*Per Curiam.* We are of opinion that the act of 1880 (Chap. 269), regulates the review of assessments in towns, cities and villages by *certiorari*, and renders inapplicable to such cases the general provisions of the Code which were invoked by the petitioner.

"The order of the General Term was, therefore, right, and should be affirmed, with costs."

John B. Pine for appellant.

M. G. Hart for respondent.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

THE NEW YORK LIFE INSURANCE AND TRUST COMPANY,
Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK et al., Respondents.

(Argued June 22, 1887; decided July 1, 1887.)

R. J. Emmet for appellant.

D. J. Dean for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

SAMUEL GOODMAN et al., Appellants, v. MICHAEL BALL et al.,
Respondents.

FREDERICK BUHL et al., Appellants, v. SAME, Respondents.

(Submitted June 22, 1887; decided July 1, 1887.)

Wadsworth & Loveridge for appellants.

Baker & Schwartz for respondents.

Agree to dismiss appeals; no opinion.

All concur.

Appeals dismissed.

LEWIS NEWGASS, Appellant, v. ROBERT SALOMON, Respondent.

FROILAU MIRANDA et al., Appellants, v. SAME, Respondent

JULIUS BEER et al., Appellants, v. SAME, Respondent.

(Submitted June 22, 1887; decided July 1, 1887.)

Wales F. Severance for appellants.

Blumenstiel & Hirsch for respondent.

Agree to reverse orders of General and Special Terms, and
to deny motion.

All concur.

Ordered accordingly.

In the Matter of the Petition of BENJAMIN RUSSAK et al.

(Argued June 22, 1887; decided July 1, 1887.)

Nathaniel C. Moak for appellant.

Edwin L. Kalish and *Alfred Juretski* for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THE CORN EXCHANGE BANK OF CHICAGO, Appellant, v.
ALPHONZO W. BLYE, Respondent.

(Argued June 23, 1887; decided July 1, 1887.)

L. A. Gould for appellant.

Elihu Root for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

WILLIAM H. OLMSTED, Respondent, v. THE ROCHESTER AND
PITTSBURGH RAILROAD COMPANY et al., Appellants.

(Argued June 23, 1887; decided July 1, 1887.)

Wheeler H. Peckham for appellants.

John Proctor Clarke for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW
YORK, Appellant, v. THE TONAWANDA VALLEY AND CUBA
RAILROAD COMPANY et al., Respondents.

(Argued June 27, 1887; decided July 1, 1887.)

O. P. Buell for appellant.

Herbert B. Turner for respondents.

Agree to affirm on opinion below.

All concur except ANDREWS J., not sitting.

Judgment affirmed.

JOSEPH EAGER, Appellant, v. JONATHAN SNIFFEN et al.,
COMMISSIONERS, etc., Respondents.

(Argued February 3, 1887; decided October 4, 1887.)

Jesse Johnson for appellant.

Edward B. Cowles for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

FRANK M. THOMPSON, Appellant, v. THE TOWN OF
MAMAKATING, Respondent.

(Argued March 22, 1887; decided October 4, 1887.)

D. D. McKoon for appellant.

T. F. Bush for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CLARA F. VISCHER, Respondent, v. STANLEY BAGG, Appellant.

(Argued June 20, 1887; decided October 4, 1887.)

Hiscock, Gifford & Doheny for appellant.

T. K. Fuller for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARGARET M. POWELL, Administratrix, etc., Respondent,
v. THE BOARD OF SUPERVISORS OF SARATOGA COUNTY,
Appellant.

THIS case presented the same questions and was argued and
decided with *Parker v. Board of Supervisors*, ante, p.

ALBERT W. DARROW, Appellant, v. HORACE F. DARROW et al.,
ISAAC G. HORTON, JR., Purchaser, etc., Respondent.

(Submitted June 23, 1887 ; decided October 4, 1887.)

J. Stewart Ross for appellant.

Augustus M. Price for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

THE AMERICAN EXCHANGE NATIONAL BANK, Respondent, v.
STEVENS, VOISIN, LAWRENCE & COMPANY, Junior Attach-
ing Creditors, Appellants.

(Argued June 23, 1887 ; decided October 4, 1887.)

John W. Boothby for appellants

L. B. Bunnell for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

WILLIAM WILLIAMS, Appellant, v. ROBERT W. FREEMAN,
Respondent.

(Argued June 23, 1887 ; decided October 4, 1887.)

John S. Wood for appellant.

Henry P. Starbuck for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

HENRY R. PIERSON, as Receiver, etc., Appellant, v. ANDREW W. MORGAN, JUSTINE M. CRONK, as Administratrix, etc., Respondent.

(Argued June 23, 1887 ; decided October 4, 1887.)

Raphael J. Moses, Jr. for appellant

P. H. Vernon for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

THE PEOPLE ex rel. JOHN McLAUGHLIN, Appellant, v. THE COMMISSIONERS OF THE DEPARTMENT OF FIRE AND BUILDINGS OF THE CITY OF BROOKLYN, Respondent.

(Argued June 23, 1887 ; decided October 4, 1887.)

THIS case presented the same question and was decided on the authority of *People ex rel. Peck v. Commissioners* (ante, p. —).

Edward F. O'Dwyer for appellant.

Almet F. Jenks for respondent.

Per Curiam mem. for reversal.

All concur.

Order reversed.

THE PEOPLE ex rel. JOHN T. LOCKMAN, Respondent, v. JAMES A. FLACK, the Clerk of the City and County of New York, Appellant.

(Argued June 23, 1887; decided October 4, 1887.)

D. J. Dean for appellant.

Theodore De Witt for respondent.

Agree to affirm ; no opinion.

All concur.

Orders affirmed.

ERASTUS S. PROSSER, Respondent, v. THE FIRST NATIONAL BANK OF BUFFALO et al., Appellants.

(Argued June 24, 1887; decided October 4, 1887.)

THIS action was brought to recover damages sustained by plaintiff in the purchase of certain shares of stock, which the complaint alleged were bought by plaintiff from defendant, the First National Bank, the purchase being induced by certain false and fraudulent representations as to its financial condition made by its president on its behalf. The trial court found that plaintiff did not purchase the stock in question of said defendant, but of its president, and that, therefore, it was not chargeable with the false representations made by that officer. The General Term reversed the judgment. The order of reversal did not state that it was upon the facts. The court, therefore, here held that the justification of the reversal must be found in some error of law ; that, as matter of law, the evidence fully sustained the finding of the trial court ; and that no error was pointed out by any of the other exceptions in the case.

John G. Milburn for appellants.

James F. Gluck for respondent.

EARL, J., reads for reversal of order of General Term and affirmance of judgment of trial court.

All concur, except RUGER, Ch. J., not voting.

Judgment accordingly.

106 678
112 661

JACOB MORRIS, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

In an action against a railroad company to recover damages for an injury to a passenger caused by the falling upon him of an article placed in a rack over his seat by another passenger, *held*, that in looking for and protecting passengers from such dangers, a carrier was not required to exercise the highest care which human vigilance can give, but only reasonable care, to be measured by the circumstances surrounding each case.

(Argued June 27, 1887; decided October 4, 1887.)

THIS action was brought to recover damages alleged to have been sustained by plaintiff when a passenger upon defendant's road, in consequence of the falling upon him of a clothes wringer which had been placed by another passenger in a rack over plaintiff's seat.

The following is the opinion in full:

"The learned judge, in submitting this case to the jury, instructed them that there was no evidence upon which they could find that the car or the rack therein was insufficient, and that there was no negligence upon the part of the defendant in receiving the clothes-wringer in the car, nor was there evidence that any employe of defendant saw the wringer put in the rack or knew of its being so put in, and that the defendant was not guilty of negligence in permitting the wringer to be put in the rack. In this we think he was entirely right. He, however, did submit one question for the determination of the jury and in the following language: 'The wringer which has been described to you was in this rack. Was it an article which was insecure to be so placed and was it calculated to endanger the safety of the passenger who took his seat in the vicinity of this wringer? The second

question, and perhaps the one which is the more important, is whether the wringer was so wrapped and enveloped as to conceal the real character of the wringer from the ordinary, careful inspection of the employe of the railroad. The railroad corporation, as I regard the law, would not be liable, even although an article not strictly baggage, should be placed in one of these receptacles, provided the corporation had no notice of the character of the objectionable article and providing also that there was nothing in the appearance of the parcel to indicate, upon proper inspection by the employes, the character of the article concealed in the package. * * *

Was it so bound and so enveloped as that the employe, in the fair and honest discharge of his duties, exercising a degree of vigilance which he ought, under the circumstances, in your judgment, to have exercised ; was it so exposed that by passing through in the discharge of his duties there that he should have observed what it was or not ? * * * It is a simple question for you to determine upon this branch of the case whether this wringer was so enveloped as not to be obvious and discernable to the employes of the road in the honest and faithful discharge of their duty on that occasion, which the law required at their hands. If it was obvious they should have observed ; if it was not, then there was nothing which gave to them constructive notice of the existence in that wrapper of an article which was dangerous and which they were bound to remove.'

" We think there was not sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. It is indisputed that the parcel was, to some extent, wrapped up in paper, and even if only covered in the manner described by the plaintiff, its apparent character, both as to bulk and weight, was not such as reasonably to call the attention of the train hands to it, or, if noticed by them, it was not so apparently placed in a dangerous position as to demand from them an order for its removal from the rack.

" In looking out for dangers arising from causes such as this, we do not think that carriers of passengers are to be held to the exercise of the highest care which human vigilance can give.

That measure of care has been spoken of as due from them in the actual transportation of the passenger, and, in regard to the results naturally to be apprehended from a failure to furnish safe road beds, proper machinery, perfect cars or coaches, and things of that nature. But, in regard to a danger of this kind, a carrier of passengers is, we think, held to a less strict measure of vigilance. Reasonable care (to be measured by the circumstances surrounding each case), to prevent accidents of this nature, is all that is demanded, and we do not think there was evidence in this case of any such lack of care on the part of the officers of the train.

“From the evidence it seems to be quite clear that there was nothing extraordinary about the parcel or its position in the rack, and nothing to attract particular attention to it, and so the failure of the train hands to notice it, or, if noticed, to order its removal, was not negligence.

“We think the motion for a nonsuit on this ground should have been granted, and for this reason the judgment should be reversed, and a new trial ordered, costs to abide event.”

Matthew Hale for appellant.

Andrew Hamilton for respondent.

PECKHAM, J., reads for reversal and new trial.

All concur, except DANFORTH, J., dissenting.

Judgment reversed.

MARY A. E. LA DUKE, Respondent, v. THE VILLAGE OF
FULTON, Appellant.

(Submitted June 27, 1887; decided October 4, 1887.)

Wm. C. Stephens for appellant.

Wm. E. Ayers for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LAVINIA C. H. DEMPSEY, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Submitted June 27, 1887; decided October 4, 1887.)

John H. V. Arnold for appellant.

D. J. Dean for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LUCIUS F. REED, Respondent, v. A. G. DARWIN, Appellant.

(Submitted June 30, 1887; decided October 4, 1887.)

Horace W. Fowler for appellant.

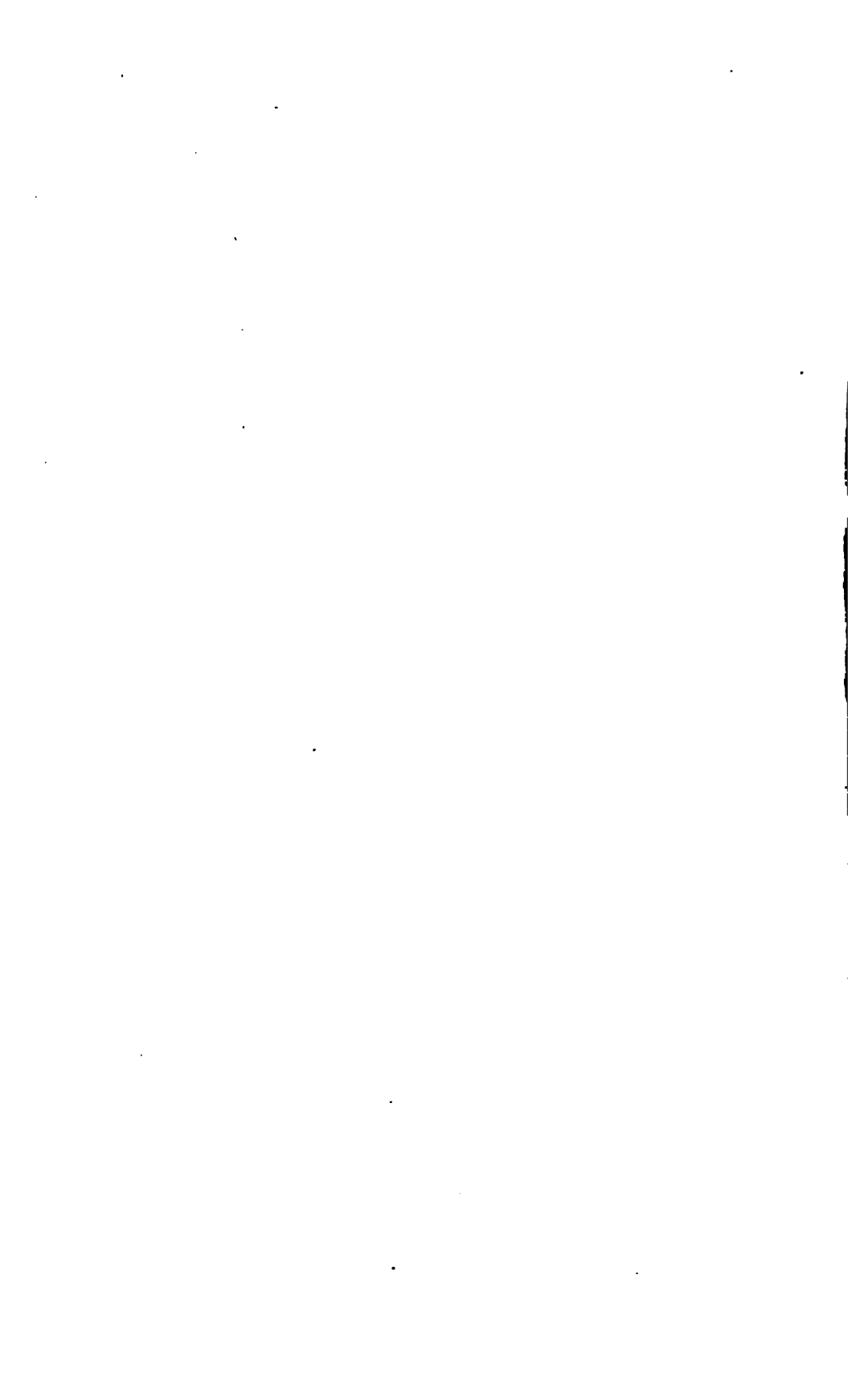
L. A. Fuller for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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ABANDONMENT (OF CHILDREN).

1. To warrant an arrest under the section of the Penal Code (§ 291, subd. 2), directing the arrest of a female child "who has been abandoned or improperly exposed or neglected by its parents or other person having it in charge," it must appear that the child was abandoned and neglected by the fault of her parents or custodians. *People ex rel. v. N. Y. C. Protective*. 604
2. In proceedings on writs of *habeas corpus* and *certiorari* it appeared that a female child was committed to the custody of defendant for an assumed violation of said provision. The only evidence in the record of the proceedings before the justice was the complaint and the commitment; in the former she was charged with having been found "improperly exposed and neglected and wandering" in a public park "without any proper guardianship," and the commitment recited that the material allegations of the complaint were established. *Held*, that the complaint did not bring the case within the said provision, as it was not alleged that she was so exposed by those having her in charge. *Id.*
3. The information in such a case should be precise and bring it clearly within the statute; when it omits any essential ingredient or circumstance, and the defect is not supplied by the evidence, the conviction is bad. *Id.*
4. The complaint also charged "that the said child was found in the company of * * * who is a reputed prostitute," in violation of the provisions of the Penal

Code. The return to the writs simply averred its incorporation, and that, by virtue of defendant's charter and section 292 of the Penal Code, the child was committed to its custody under a commitment, a copy of which was annexed, which recited that the conviction proceeded upon proof of the charge made. The relator traversed the return, alleging, in substance, that the child had done no act prohibited by the Penal Code, but was in the park at the time charged for an innocent and lawful purpose, and having parents with whom she resided. Defendant demurred to this traverse. *Held*, that the complaint followed substantially the language of the fourth subdivision of said section and was sufficient as matter of pleading; that the averments in the traverse admitted by the demurrer might show that the child was wrongfully convicted, but it could not be inferred therefrom that there was no evidence before the magistrate justifying the conviction; and that a retrial upon the merits could not be had in these proceedings. *Id.*

5. It was admitted that no notice of the proceedings before the magistrate was given to the father of the child, with whom she resided, and that he was not present at the examination. The relator, her mother, was present. *Held*, that by reason of the omission of notice to the father the magistrate proceeded without jurisdiction; also, the fact that the father is not the relator and does not make the application for the discharge did not affect the question. *Id.*
6. Under the provision of said section, as amended in 1886 (Chap 31, Laws of 1886), declaring that when

it shall appear by the warrant of commitment that "the parent, guardian or custodian" was present at the examination before the magistrate or had such notice thereof as the magistrate shall deem sufficient, no further or other notice shall be necessary, where both parents are living the notice must be to, or the appearance by the father. *Id.*

7. The court below, on granting or affirming an order of discharge in such proceedings, has no authority to allow costs. *Id.*

ACCOMPLICE.

1. To meet the requirements of the provision of the Code of Criminal Procedure (§399), forbidding a conviction upon the testimony of an accomplice unless "corroborated by such other evidence as tends to connect the defendant with the commission of the crime," it is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime or to connect the defendant with it; nor need such evidence be wholly inconsistent with the defendant's innocence; it is sufficient if there is some evidence fairly tending to connect the defendant with the commission of the crime; and it is then for the jury to determine whether the corroboration is sufficient to satisfy the jury of the defendant's guilt.. *People v. Elliott.* 288

2. Defendant was indicted for forgery charged as a second offense, in uttering a forged draft. An accomplice who procured the money on the draft from a bank in the city of R., testified on the trial to the commission of the crime. It appeared by other evidence that defendant had been previously convicted of the crime of forgery, sentenced and served a term in State's prison; that he and the accomplice were acquaintances and associates in the city of New York; that he was in R. and at C., a place near R., some days prior to

the commission of the crime and registered at three hotels under an assumed name; that the accomplice was with defendant at C. and was introduced by him to a third person. The president of the bank testified that he thought he had seen defendant in the bank. Defendant gave no explanation of his presence at R. and after his arrest declared that he did not know and had never seen the accomplice. Upon being arrested in New York he asked the detective if any one had been arrested in R., and upon being asked "why" he said "there must be somebody who had done some talking," and while denying that he committed the crime, said he knew who did it. *Held*, that there was sufficient corroboration to sustain a conviction. *Id.*

VERSE POSSESSION.

In an action of ejectment defendant claimed, by adverse possession for more than twenty years, under a claim of title founded on a deed from W., executed in 1858. The premises were originally part of a farm purchased by L., but conveyed to W. in trust for the "sole use, benefit and behoof" of L. The latter died in 1846, leaving a will executed in 1839, by which he devised a portion of the farm to his daughter P., for life, remainder to her male heirs. By the will provision was made for payment of a mortgage on the farm by applying thereon moneys due the testator upon a larger mortgage held by him. W. was one of the executors of said will. A division of the farm was made, with the assent of W. among the devisees, and the premises in question were set off to P., who took possession and was in possession at the time of the execution of the deed by W. P. died in 1870. W. was held by the trial court to have been, at the time of the execution of his deed, a mortgagee in possession, upon evidence to the effect that there was found among his papers after his death the mortgage upon the farm with

an indorsement thereon signed by B., the then holder, dated in 1843, acknowledging the receipt of one dollar in full discharge thereof, also an assignment of the mortgage from B. to W., dated in 1843, but acknowledged on the same day the discharge was executed. It did not appear that W. ever entered into possession of the property or claimed to hold it by virtue of the mortgage or by any other right or tenure. The mortgage referred to in the will as the source of payment of B.'s mortgage was satisfied of record, on the day after the date of the discharge. W. settled his accounts as executor without any claim of any indebtedness to him on account of payment of the mortgage. *Held*, that the decision of the trial court was error, that the grantee of W. took no interest under his deed, because it was void under the statute by reason of the adverse possession of P., at the time of its execution and because at that time W. had no possession of the premises or mortgage thereon. *Ellwood v. Northrup.* 173

AGREEMENT.

See CONTRACTS.

AMENDMENTS.

1. A bill of particulars, like a pleading, may be amended. *Case v. Pharis.* 114
2. A plaintiff is not bound to furnish a statement of payments or off-sets which he has voluntarily credited and where he has done so in such a manner as by mistake to have periled his right or made ambiguous his meaning, the allowance of an amendment striking out the statement is proper. *Id.*

— *Of complaint on trial, when proper.*

See Arery v. N. Y. C. & H. R. R. Co. 142

— *On trial of application for insurance, when proper.*

See Bennett v. A. Ins. Co. 243

APPEAL.

1. Although it appears by the opinion of the General Term that a judgment in an action tried by the court was reversed upon the facts; yet if this does not appear in the order of reversal this court is bound to presume that the reversal was upon questions of law only. *Lewis v. Barton.* 70
2. Plaintiff claimed to recover, among other things, for board furnished defendant; the latter answered denying the claim, and set up a counter-claim for board furnished by him to the plaintiff, who replied, denying the counter-claim. Plaintiff served a bill of particulars, which contained a charge against defendant for board and a credit to him for similar service of less amount. The trial was conducted by both parties upon the theory that the question of legal liability for board was an open one, and no objection was made by defendant to evidence offered to defeat his claim by plaintiff. The referee refused to allow either claim upon the ground that, while board was furnished as alleged, the relations of the parties were such that, in the absence of an express agreement, no promise to pay on either side could be implied. *Held*, that having reference to the form of the pleading and the issues raised, the credit given in plaintiff's bill of particulars was not a conclusive admission of legal liability to that amount; also, that if defendant had intended to rely upon the alleged admission, he should have raised the question on the trial when the bill might have been amended by striking out the credit; and, having failed so to do, he could not raise it on appeal. *Case v. Pharis.* 114
3. Where an action to recover damages for an alleged interference with plaintiff's rights in a street was tried upon the theory that plaintiff owned the fee to the center of the street, or an easement therein, and no question was raised by defendant in reference thereto on the trial, *held*, that no such

- question could be raised upon appeal. *Drucker v. Manhattan L. Co.* 157
4. This court has no authority to review the determination of the court below as to the propriety of a sale of the lands of a religious corporation. *In re First Presb. Soc.* 231
5. Where the determination of an inferior tribunal, brought up for review by *certiorari*, has been reversed by the court granting the writ as against the weight of evidence, and the evidence is such that the court, guided by the rules governing it on application to set aside the verdict of a jury, would have power so to do, the decision is not reviewable here. *People ex rel. v. Bd. Fire Comrs.* 257
6. The provision of the Code of Civil Procedure (§ 2140), specifying the questions involving the merits which may be determined by the court on return to a writ of *certiorari*, has no application to a hearing on appeal to this court, and in no way enlarges its jurisdiction; it is confined in its operation to the court in which the hearing is originally had. *Id.*
7. *It seems* that, in a case involving a plain violation of the well-known rules governing applications for a new trial on the ground that the verdict is against the weight of evidence, or where it can be seen that there was an abuse of the discretion of the court below in its decision on such a hearing, this court may review the decision. *Id.*
8. An order vacating an order for the examination of a party is not reviewable here, unless it appears from it that the decision was placed upon some ground of law not involving discretion. *Jenkins v. Putnam.* 272
9. Where, in an action to restrain the alleged unlawful use and occupancy of plaintiff's premises, he bases his right to recover in his complaint and upon the trial exclusively upon his legal title to the land and the invasion of his right as owner, he may not sustain a judgment in his favor on appeal on the ground that the *locus in quo* is a public highway in which he has rights as abutting owner which have been infringed upon by defendant. *Vail v. L. I. R. R. Co.* 283
10. The determination of the board of examiners of buildings in the city of New York as to the mode of construction of a building, if their requirements are not wholly impracticable, even if they are unreasonable, may not be reviewed by the courts. *Fire Dept. v. Atlas S. S. Co.* 566
11. An erroneous ruling, excluding testimony affecting only the credibility of a witness, is not a ground for reversal, where it appears that the evidence of the witness was wholly immaterial. *Teets v. Village of Middletown.* 651
12. Where the cause of action stated in a complaint, which was for more than \$500, was put in issue and contested on the trial and was allowed by the jury, but the recovery was for less than that sum because of the application of an undisputed counter-claim. *Held*, the amount in controversy was for more than \$500, and the case was appealable to this court. *Reed v. Trowbridge.* 657
- *When decision of court below as to laches not reviewable here.*
See W. P. Bank v. Gerry. 467
- *Parties not interested, and so not aggrieved, may not appeal.*
See Hyatt v. Dusenbury. (Mem.) 663
- *Where order of General Term reversing judgment in action tried by court does not state reversal was upon the facts, justification for the reversal must be found in some error of law.*
See Prosser v. F. N. Bank. (Mem.) 677

APPURTENANCES.

By the word "appurtenances" incorporeal easements or rights or priv-

illegals will alone pass; and of these only such as are necessary to the proper enjoyment of the estate granted. *Griffiths v. Morrison*. 165

ARREST.

1. This action was for the conversion of a promissory note; the answer alleged a former suit pending. It appeared that in March, 1883, plaintiff commenced an action on contract against defendant to recover the proceeds of said note, and of another, both of which were delivered to defendant to sell, and were unaccounted for by him, which action was instituted in reliance upon defendant's representation that the notes had been sold. Judgment was entered in that action by default in April, 1883, for the amount of both notes, and on examination of defendant in supplementary proceedings thereon, in May, 1883, it appeared that he had the note in suit here in his possession when the former action was commenced. Said judgment was vacated on plaintiff's motion, and an order procured for a commission and a reference to examine defendant, after which, in October, 1883, this action was brought. In May, 1883, after notice of trial had been served, and eight days before trial, the complaint in the first action was amended so as to limit it to the other note. When the motion to vacate the judgment in the first action was made, defendant was imprisoned by virtue of an order of arrest issued therein. No execution against his person had been issued. As a condition of granting the motion, the court required plaintiff to stipulate that defendant should be permitted to make application for his discharge at the time he would have been entitled to make it if the judgment had not been vacated and if execution had been issued thereon. The stipulation was made as required. *Held*, that this did not convert the order of arrest into a body execution, and did not operate to discharge and satisfy the cause of action. *Bowker P. Co. v. Cox*. 555

2. To warrant an arrest under the section of the Penal Code (§ 291, subd. 2), directing the arrest of a female child "who has been abandoned or improperly exposed or neglected by its parents or other person having it in charge," it must appear that the child was abandoned and neglected by the fault of her parents or custodian. *People ex rel. v. N. Y. C. Protective*. 601

ASSESSMENT AND TAXATION.

1. The provisions of the railroad act of 1869 (§ 4, chap. 907, Laws of 1869), directing and providing for the application of taxes assessed upon any railroad in a town, city or village, toward the redemption of bonds issued by the municipality to aid in the construction of such railroad, are not in conflict with any constitutional provision. *In re Clark v. Sheldon*. 104
2. They do not impose a tax upon property in other portions of the county for the benefit of the town, city or village; they simply deprive such other portions of the benefit derived from the taxation of railroad property in the municipality. *Id.*
3. They are not violative of the provision of the State Constitution (§ 8, art. 7), prohibiting the payment out of the treasury of the State of any moneys, except in pursuance of an appropriation, etc.; as the fund realized from such taxation does not belong to the State or go into its treasury. *Id.*
4. They are not repugnant to the constitutional provision (§ 20, art. 3), declaring that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied; the said provision simply specifies what may be done with a tax which has been legally imposed. *Id.*
5. Said statutory provisions include all taxes of every description save those excepted therein, i. e., school

- and road taxes, and so include town, village, city, county and State taxes. *Id.*
6. The scheme of the act is practicable and not difficult of execution. *Id.*
 7. *It seems* the officers imposing the taxes, may ascertain the amount required to be paid under said provisions to the county treasurer and held by him as a sinking fund and specify the same in the warrant issued to the collector. If not so specified, the collector may make the proper deduction of school and road taxes and pay the balance to the county treasurer. If the duty of making the separation has not been discharged before payment to the county treasurer, it devolves upon him to make the separation and invest the proper amount as directed by the statute. *Id.*
 8. It is not requisite that the taxes so to be appropriated should be specially levied; they are to be levied in the same way as other taxes. *Id.*
 9. The said provisions are applicable to any municipality having bonds outstanding issued in aid of the construction of any railroad; and they are not limited to railroads constructed under said act of 1869. *Id.*
 10. Where, upon application under said act, of a taxpayer of a town, to compel the county treasurer to execute the provisions of the act, it appeared that the taxes imposed upon railroads in the town for the year specified, after deducting school and road taxes, were much more than the sum specified in the petition as the amount of such taxes paid to the county treasurer. *Held*, that it was no defense that the petitioner had not prayed for a sufficient amount; that the county treasurer could not complain of this, or of an order requiring him to set aside a less sum than the act required. *Id.*
 11. *It seems*, that in such case, notwithstanding the prayer of the petition, the county judge has power to ascertain the amount and compel the county treasurer to set aside for a sinking fund all the taxes which may appear to have been paid to him, and which, by the act, are devoted to that purpose. *Id.*
 13. It is no answer on the part of the county treasurer in such proceedings that if he sets aside the taxes as required by the act there will be a deficiency in other funds, the law having appropriated them for a specific purpose, it is his duty to so apply them, and he may not use them for other purposes. *Id.*
 13. All prior laws in conflict with said provisions or requiring a different disposition of taxes so collected, were thereby so far modified or repealed. *Id.*
 14. Where the assessors' oath, sworn to and attached to an assessment-roll, after the passage of the act of 1885 prescribing the form of such oath (Chap. 267, Laws of 1885), instead of following that form was drawn in conformity to the statute in existence when that act was passed, and the roll so verified was delivered to the supervisor of the town, but before it had been in any way produced before or acted upon by the board of supervisors a new oath in proper form was attached to the roll. *Held*, that the verification was valid; that in this respect and to this extent the provision of the statute as to the time of verification is directory only. *People ex rel. v. Jones.* 330
 15. The proportion of the State tax levied upon a county and charged to its treasurer is payable by him; not as the officer or agent of the county but as an individual, designated by his official name for the performance of specific duties, and the county is not responsible for his omissions or defaults in respect thereto save in the manner prescribed by law. *First Nat. Bk. v. Bd. Sup'rs.* 488
 16. In case of the failure or neglect

of the county treasurer to pay over the taxes due the State, or to render an account thereof to the comptroller, it is not until the remedy against him and against his bail has been exhausted and the loss by reason of that default has been thus ascertained, that the county is required to act or any duty is attached to it. (Chap. 427, Laws of 1853, Chap. 393, Laws of 1863.) *Id.*

17. The act of 1880 (Chap. 269, Laws of 1883), providing for the review of assessments by *certiorari*, regulates that subject and renders inapplicable to such case the provision of the Code of Civil Procedure (§ 2120 *et seq.*), in reference to the writ of *certiorari*. *People ex rel. v. Assessors Town of Greenburgh.* 671

ASSIGNMENT.

1. Defendants' firm entered into a contract with the firm of R. W. I. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading, by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer, he agreed to accept the goods purchased of defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order, drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last

of December or early in January, 1883. R. & Co. gave their notes as agreed for the purchase-price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum De L. gave his own notes and the acceptances of third persons to R. & Co. in payment for the goods. R. & Co. soon after stopped payment and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid the purchase-price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods, *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co. under the contract, and inasmuch as against R. & Co., defendants had the right to refuse to deliver the goods without payment therefor, after that firm became insolvent, they had the same right as against De L. or his assignee. *Anderson v. Read.* 333

2. Also *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that defendants were not estopped from showing the fact that no title passed, or from denying the legal right of plaintiff, as assignee of De L., to a delivery of goods of the same character and quality as described. *Id.*

—Assignee of covenant by a vendor of stock, good will, etc., of a business, that he will not engage in same business within certain bounds, may maintain action to restrain breach of covenant. *See D. M. Co. v. Roebur.* 473

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. In January, 1883, M. made an assignment for the benefit of cred-

itors. Among the property assigned were certain stereotype and electrotype plates then in the possession of L. & D., as custodians for M., upon which was a chattel mortgage, which was not filed until the day of the execution of the assignment. In March, 1883, L. & D. recovered a judgment against M. for a debt accruing prior to January, and attempted to levy upon the plates by virtue of an execution issued thereon. By an order made in this action the assignee was removed and a receiver, *pendente lite*, of the assigned property appointed. In proceedings instituted by the receiver against L. & D., who had refused to deliver up the plates, it was adjudged that said firm had no lien, and that the receiver was entitled to possession. The plates were thereupon, and previous to July, 1883, delivered to the receiver. In March, 1884, the receiver applied *ex parte* for directions as to the disposition of the property, and an order was thereupon made directing a sale of the plates and payment of the mortgage debt out of the proceeds; this the receiver did. In November, 1884, L. & D. petitioned to have the *ex parte* order vacated so far as it directs the payment of the mortgage. *Held*, that the petition was properly denied; that as, at the time of the sale, L. & D. had no lien upon the property, their remedy, if any, was to obtain an order of the court directing as to the disposition of the proceeds, and until this was done it was the duty of the receiver to proceed under the order of the court; that when the mortgage became payable the mortgagee, in the absence of fraud, became entitled, as against the mortgagor and his representatives, and all other persons who had not acquired liens, to demand, receive and sell the mortgaged property; that after waiting a reasonable time to enable the petitioners to take steps, if they desired, to establish a right to the property, it was the duty of the receiver to apply for and take the directions of the court, and he was under no obligation to give notice to the

general creditors, and that the petitioners having laid still from July, 1883, to November 1, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property, if they had any equitable interest (as to which *quære*), they had lost it by their laches. *Sullivan v. Miller.* 635

2. The principles governing an accounting by an assignee under a general assignment control in such a case, and relieve the receiver from any liability for payments and disbursements made in good faith in the execution of the duties of his receivership. *Id.*

ATTORNEY AND CLIENT.

1. Where an attorney is employed, without agreement as to compensation, to bring a great number of actions, alike in their nature, involving no complicated questions of law and only the most simple questions of fact; which actions are disposed of by obtaining judgments by default or otherwise without contest, there is no rule of law which makes, as against his client, the taxable costs the measure of compensation to which he is entitled for his services. He is simply entitled to what it can be shown the services are reasonably worth under the circumstances. *Starin v. Mayor, &c.* 82
2. *It seems* that since the passage of the Code, there is no rule of law which in any case makes the compensation of the attorney necessarily co-extensive with the taxable costs, in the absence of an agreement. *Id.*

BANKRUPTCY.

1. The effect of the amendment of 1874 of the provision of the bankrupt act (§ 39), in reference to the recovery of money or property paid, sold, assigned or transferred by a bankrupt contrary to the act, was to remove the prior

absolute prohibition against the proof of a debt by a creditor who had obtained a preference which had been annulled, and to confine the prohibition to cases of actual fraud, and to limit it even in those cases to a disability to prove more than one-half of the debt. *Jeff. Co. Nat. Bk. v. Streeter*. 186

2. In an action against an indorser of certain promissory notes, it appeared that plaintiff duly obtained judgment against the makers on default. *Id.*

8. After personal service of process executions were issued and levied on a stock of goods. Thereafter proceedings in bankruptcy were commenced against the judgment debtors, and upon application of the petitioning creditors, the attorney for the plaintiff consenting, an order was made by the bankruptcy court appointing the sheriff special receiver of the bankrupt's estate, and directing him to sell the property levied on and deposit the proceeds subject to the further order of the court. The order also provided that the lien of the judgment-creditors, if any, should "follow and attach to the moneys arising from the sale." In an action subsequently brought by the assignee in bankruptcy it was adjudged that plaintiff's judgments were void as against the assignee, and that the latter was entitled to the proceeds of sale of the goods, not because of any actual fraud on the part of plaintiff, but on the ground of constructive fraud, growing out of the fact that its attorney had notice of the insolvency when he commenced the actions against the bankrupts, and designed to obtain a preference. *Held*, that the obtaining of the judgments and the levy upon the property of the bankrupts was such a transfer of property as brought the case within said provision; but that plaintiff was not debarred from proving its debt; and that, therefore, its action did not prejudice or interfere with defendant's rights as indorser, and so constituted no defense. Also, *held*, that the decision of the

bankruptcy court that no lien was acquired by the levy as against the assignee was conclusive, and the question was not open for contestation by the defendant. *Id.*

4. *It seems* that to constitute actual fraud within the meaning of said provision, actual complicity or a conscious purpose on the part of the creditor to accomplish a known fraud upon the act must be shown. *Id.*
5. In 1875 the firm of G. T. & Co., composed of the defendants, executed to plaintiff its promissory note upon which this action was brought, and judgment was recovered in January, 1883, against all of the defendants. In August, 1878, defendant G., then being a resident of Massachusetts, filed his petition in bankruptcy, and in March, 1883, obtained his discharge from all debts and claims provable against his estate which existed on August 3, 1878, save as excepted by the bankrupt act. Before the petition in bankruptcy was filed the firm was dissolved, an assignment of its property made and the assets distributed among creditors. An application made by G. in September, 1886, for a discharge of said judgment of record as against G. was granted. *Held*, that the discharge in bankruptcy covered the judgment; that conceding G. could have obtained from the United States Court a stay of proceedings in this action, he was not bound so to do, and his omission could not deprive him of the benefit of the provision of the Code of Civil Procedure (§ 1268), providing that at any time after the lapse of two years from a bankrupt's discharge he may apply to the court in which a judgment was rendered against him to have it discharged of record, and requiring the court to grant the application "if it appears that he has been discharged from the payment of that judgment;" also, that if the doctrine of *laches* applied, it was for the court below to deal with it, and its decision was not reviewable here. *West Phila. Bk. v. Gerry*. 467.

6. Under the late bankrupt act, in proceedings instituted for his discharge by one member of a firm, upon his individual petition, partnership debts were provable, and he was entitled to be discharged from them, whether there were any assets of the firm or not. *Id.*
7. It was objected that the judgment was not included in G's schedule in bankruptcy; it appeared that the note upon which the judgment was recovered was set forth. *Hekl*, that a discharge of the cause of action discharged the judgment. *Id.*
8. *It seems*, the said provision of the Code introduced no new law, but simply conforms with and was affirmatory of the previous uniform practice of the courts. *Id.*

BILLS, NOTES AND CHECKS.

1. An indorser of a promissory note is not estopped from setting up usury as a defense thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full consideration and subject to no defense of usury or otherwise, where it appears that when the note was transferred to the holder he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred. *Lewis v. Barton*. 70
2. As to all contracts, relating to her separate estate or made in the course of her separate business, a married woman stands at law on the same footing as if unmarried, and can, therefore, make or authorize her husband as agent to make for her, negotiable paper which will be governed by the law merchant: and may be sued upon it in the ordinary way by general complaint without special averments. *Noel v. Kinney*. 74
3. In an action against an indorser of certain promissory notes, it appeared that plaintiff duly obtained judgment against the makers on

default. After personal service of process executions were issued and levied on a stock of goods. Thereafter proceedings in bankruptcy were commenced against the judgment-debtors, and upon application of the petitioning creditors, the attorney for the plaintiff consenting, an order was made by the bankruptcy court appointing the sheriff special receiver of the bankrupt's estate, and directing him to sell the property levied on and deposit the proceeds subject to the further order of the court. The order also provided that the lien of the judgment-creditors, if any, should "follow and attach to the moneys arising from the sale." In an action subsequently brought by the assignee in bankruptcy it was adjudged that plaintiff's judgments were void as against the assignee, and that the latter was entitled to the proceeds of sale of the goods, not because of any actual fraud on the part of plaintiff, but on the ground of constructive fraud, growing out of the fact that its attorney had notice of the insolvency when he commenced the actions against the bankrupts, and designed to obtain a preference. *Held*, that the obtaining of the judgments and the levy upon the property of the bankrupts was such a transfer of property as brought the case within said provision; but that plaintiff was not debarred from proving its debt; and that, therefore, its action did not prejudice or interfere with the defendant's rights as indorser, and so constituted no defense. Also, *held*, that the decision of the bankruptcy court, that no lien was acquired by the levy as against the assignee, was conclusive, and the question was not open for contestation by the defendant. *Jeff. Co. Nat. Bk v. Streeter*. 186

4. A purchaser for value of negotiable paper after maturity is not a *bona fide* purchaser to the extent of being protected in his purchase against the rightful owner, from whom it has been stolen, unless he has succeeded to the rights of a *bona fide* purchaser

before maturity. *Northampton Nat. B'k v. Kidder.* 221

at the specified rates. *Woodruff v. Havemeyer.* 129

5. The burden is upon the purchaser in such case to show that he is, or has succeeded to the rights of, a *bona fide* purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue. *Id.*
2. A bill of lading, in general, is binding upon and protects all persons who by means of or under it, become the owners or custodians of the goods. *Id.*

BILL OF LADING.

1. Defendants were the owners and consignees of certain cargoes of sugar which were transported to New York under bills of lading, by which the carrier agreed to carry them to that port "to be delivered within reach of the steamship's tackles" to defendants. This clause in each bill was followed by a provision giving the steamer the option to discharge cargo at New York or Brooklyn, the consignees to pay landing and wharfinger charges thereon, including storage, at specified rates. The vessels on which the sugar was shipped carried general cargoes, including other sugars. On reaching New York they stopped at the regular pier of the company and discharged part of their cargoes, and then under the option in the bills of lading proceeded to Brooklyn and landed the sugars upon plaintiffs' wharves in that city, and within twenty-four hours they were delivered. Defendants were ready with lighters to receive the sugars direct from the vessel and demanded such delivery. *Held*, that plaintiffs were entitled to maintain an action to recover the landing and wharfinger's fees specified in the bills of lading; that the option contemplated, in case it was exercised, a delivery upon a wharf in Brooklyn, and defendants had no right to insist that the cargoes should be delivered from the side of the ship; also that the contract was enforceable by plaintiffs, as the receipt of the cargoes on their wharf was in legal effect a service rendered by plaintiffs upon employment of the carriers, duly authorized to contract for defendants for the service
3. Also, *held*, that the provision of the act of 1872 (§ 2, chap. 320 Laws of 1872), in relation to rates and wharfage, etc., in the cities of New York and Brooklyn, which authorizes a charge specified for goods remaining on a wharf for every day after the expiration of twenty-four hours from the time of landing, could not be construed as prohibiting the owner of a private wharf from contracting for the landing or deposit of goods upon his wharf on such terms as might be agreed upon, or as requiring him to store goods for any time without compensation. *Id.*
4. While bills of lading are not negotiable in the sense applicable to commercial paper, they are transferable and carry with them the ownership, either general or special, of the property described; the carrier, unless he has limited his liability by stamping his bills as "not negotiable," is bound to know that their office and effect is not limited to the person to whom they are first and directly issued, to recognize the validity of transfers, and to deliver the property only on the production and cancellation of the bills. *Bk. Butavia v. N. Y., L. E. & W. R. R. Co.* 105
5. A carrier corporation, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill has, in good faith, discounted a draft drawn upon the consignee, although no property was in fact delivered. *Id.*
6. No privity is necessary in such a case to make the estoppel available, other than that which flows

from the wrongful act of the agent and the consequent injury. *Id.*

7. One of defendant's local freight agents, having authority to receive and forward freight and to give bills of lading, specifying the terms of shipment, but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to one W., describing them as received to be forwarded to C., as consignee, but adding, with reference to the packages, "contents unknown." W. drew a draft on the consignee, which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were, in fact, shipped by W., or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused. In an action upon the bills of lading, *held*, that defendant was liable; and that the recital in the bills that the contents of the packages were unknown was no defense. *Id.*

8. Where actual shipment has been made the presumption is that the property delivered corresponds with that described in the bill of lading, and where a bill is issued without the delivery of the property the carrier cannot defend against the wrong by presuming if it had not occurred another would have taken its place. *Id.*

9. It is the duty of a carrier, at common law as well as under the factors' act of this State, to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming under that title, and to deliver in accordance with it; if delivery is made without it he runs the risk of showing a delivery in accordance with its instructions. *Purman v. Union Pacific R. R. Co.* 5.9

10. Plaintiff's assignees delivered to the B. S. P. Co., at Norfolk, Va., 100 bags of peanuts, marked "Y,"

for shipment to Denver, receiving a bill of lading, in which, after specifying the property, the weight and freight was the following: "Marked Y, order notify Zucca Bros." In the course of transportation the peanuts were delivered to defendant. It received no bill of lading or copy thereof from the preceding carrier, and it was not notified that any had been issued. It received a "transfer sheet" which contained this entry: "Consignee 'Y,' Hup, Zucca Bros." The same entry was made in the way-bill made up by defendant's agents at the forwarding station, but under a column therein headed "consignee and destination," the destination but no consignee was given. Defendant received no other notification as to the ownership or disposition of the goods. It delivered them at Denver to Zucca Bros., without the production or surrender of the bill of lading. That firm had no title to or interest in the goods and had refused to pay a draft drawn upon them by the shippers, forwarded for collection, which was attached to the bill of lading; these papers had, in consequence, been returned to the shippers. *Held*, that defendant, upon failure to deliver to plaintiff on demand, became liable for a conversion of the goods; that the use of the word "notify" in the bill of lading showed that Zucca Bros., were not intended as the consignees, and as none were named, no delivery could be safely made without production of the bill. *Id.*

11. *It seems* that a carrier receiving goods from another carrier is not justified in a delivery to the wrong person without a bill of lading, where one was made, although the delivery was in accordance with the papers received from the preceding carrier, in which a different consignee is named from the one named in the bill. *Id.*

— *When carrier may not alter or abrogate a special contract by subsequently issuing bills of lading.*

See Swift v. P. M. S. Co. 206

BILL OF PARTICULARS.

1. A bill of particulars, like a pleading, may be amended. *Case v. Pharis.* 114
2. A plaintiff is not bound to furnish a statement of payments or off-sets which he has voluntarily credited, and where he has done so in such a manner as by mistake to have periled his right or made ambiguous his meaning, the allowance of an amendment striking out the statement is proper. *Id.*
3. Plaintiff claimed to recover, among other things, for board furnished defendant; the latter answered denying the claim, and set up a counter-claim for board furnished by him to the plaintiff, who replied, denying the counter-claim. Plaintiff served a bill of particulars, which contained a charge against defendant for board and a credit to him for similar service of less amount. The trial was conducted by both parties upon the theory that the question of legal liability for board was an open one, and no objection was made by defendant to evidence offered to defeat his claim by plaintiff. The referee refused to allow either claim upon the ground that, while board was furnished as alleged, the relations of the parties were such that, in the absence of an express agreement, no promise to pay on either side could be implied. *Held*, that having reference to the form of the pleading and the issues raised, the credit given in plaintiff's bill of particulars was not a conclusive admission of legal liability to that amount; also, that if defendant had intended to rely upon the alleged admission, he should have raised the question on the trial when the bill might have been amended by striking out the credit; and, having failed so to do, he could not raise it on appeal. *Id.*

BOARD OF RAILROAD COMMISSIONERS.

1. The provision of the act creating the Board of Railroad Commis-

sioners (§ 13, Chap. 353, Laws of 1882), providing that the salaries and expenses of the board shall be borne by the railroad companies by assessing upon each "its just proportion, * * * one-half in proportion to the length of main track or tracks on road," means the length of the road, including its branches and auxiliary lines, if any, not the aggregate length of all its tracks where it has two or more parallel tracks between two terminal points. *People ex rel. v. Chapin.* 265

2. As to whether a determination of the officers empowered by that act to make the assessment is reviewable on *certiorari*, *quære. Id.*

BONA FIDE HOLDER,

1. A purchaser for value of negotiable paper after maturity is not a *bona fide* purchaser to the extent of being protected in his purchase against the rightful owner, from whom it has been stolen, unless he has succeeded to the rights of a *bona fide* purchaser before maturity. *Northampton Nat. Bk. v. Kidder.* 221
2. The burden is upon the purchaser in such case to show that he is, or has succeeded to the rights of, a *bona fide* purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue. *Id.*
3. The O. & M. R. R. Co., issued certain mortgage bonds on their face payable April 1, 1911, with interest semi-annually, upon presentation and surrender of the corresponding interest coupons attached to the bonds. Each bond contained a clause to the effect that, in case of non-payment, when demanded, of any installment of interest, and of its remaining unpaid for six months, or in case of default for six months in making any contribution to the sinking fund stipulated in the bond "the principal shall, without further demand or notice, become due or payable from and after the expi-

ration of six months from the date of such default." In an action for the conversion of two of said bonds a statement of facts was agreed upon to the effect that the bonds in question were stolen from plaintiff in 1876 and were purchased by defendants in 1881; that no interest had been paid thereon for the years 1877, 1878 and 1879, "and the defaults have never been made good," nor had any contribution been made to the sinking fund; that a suit for the foreclosure of the mortgage "because of the above mentioned defaults" had been commenced, which was still pending; that a receiver of the company was appointed in 1876. *Held*, that the bonds at the time of defendants' purchase were overdue; and, as it did not appear they purchased of a *bona fide* holder who purchased before maturity, plaintiff was entitled to recover; that the language of the statement implied that a demand of payment of interest was made, or that the company had done something which dispensed with its necessity; but, in any event, a default in making the stipulated payments into the sinking fund was clearly stated. *Id.*

4. Plaintiff conveyed to his son I., certain premises by deed with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and without the knowledge or consent of plaintiff, executed to defendant McK., a mortgage for \$5,000, the consideration therefor being partly certain claims held by McK. against I. and the balance a check payable to the order of I., which he transferred on the same day to plaintiff. McK. had knowledge at the time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter

McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was at the time of such assignment in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. *Held*, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and the burden of proving good faith in the transaction was upon him, and in the absence of such proof, plaintiff was entitled to the relief sought. *Scymour v. McKinstry.* 230

BONDS.

- 1 The O. & M. R. R. Co. issued certain mortgage bonds, on their face, payable April 1, 1911, with interest semi-annually, upon presentation and surrender of the corresponding interest coupons attached to the bonds. Each bond contained a clause to the effect that, in case of non-payment, when demanded, of any installment of interest and of its remaining unpaid for six months, or in case of default for six months in making any contribution to the sinking fund stipulated in the bond "the principal shall, without further demand or notice, become due or payable from and after the expiration of six months from the date of such default." In an action for the conversion of two of said bonds a statement of facts was agreed upon to the effect that the bonds in question were stolen from plaintiff in 1876 and were purchased by defendants in 1881; that no interest had been paid thereon for the years 1877, 1878 and 1879; "and the defaults have never been made good," nor had

any contribution been made to the sinking fund; that a suit for the foreclosure of the mortgage "because of the above-mentioned defaults" had been commenced, which was still pending; that a receiver of the company was appointed in 1876. *Held*, that the bonds at the time of defendants' purchase were overdue; and, as it did not appear they purchased of a *bona fide* holder who purchased before maturity, plaintiff was entitled to recover; that the language of the statement implied that a demand of payment of interest was made, or that the company had done something which dispensed with its necessity; but, in any event, a default in making the stipulated payments into the sinking fund was clearly stated. *Northampton Nat. Bk. v. Kidder*.

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2. Also, *held*, that assuming default in the payments of interest or into the sinking fund, would not render the principal of the bonds due, without some action on the part of the bondholders or the trustees under the mortgage showing an election to consider it due (as to which *quære*), the action to foreclose based upon both defaults showed such an election. *Id.*

3. Plaintiff intervened and became a party plaintiff to the foreclosure suit; some portion of the past due coupons were paid in accordance with a provision contained in the mortgage in case of foreclosure. *Held*, that the acceptance of such payment by the plaintiffs in that action was not a waiver of the election to consider the bonds due. *Id.*

4. A bond of indemnity given by an administrator to the sureties on his bond was conditioned to save the obligees "from any loss or error which might arise from or be caused by said administration." The administrator settled his accounts and was discharged. *Held*, that the bond did not cover expenses incurred by the obligees in an effort to be discharged as sureties, or in an effort, on their part,

to compel the administrator to account. *Boyle v. Boyle*. 654

BOUNDARIES.

A deed described the premises conveyed as "known by being lot No. 3 * * * lying southerly or south-easterly of Fish Lake * * * commonly called the Fish Lake lot, supposed to contain sixty-seven acres of land." Lot 3 contains about six hundred acres, all of which, except about sixty-seven acres lying south of the lake and about seven acres north of it, are covered by the lake. In an action of trespass, wherein the *locus in quo* was the seven acres, to which defendant claimed title under the deed, *held*, that the deed did not cover the seven acres; that the reference to the land intended to be conveyed as "lot 3" was a mistake or false. *Case v. Dexter*. 548

BOUNTIES.

Under the provisions of the acts of 1864 and 1865 (Chaps. 8 and 72, Laws of 1864; Chap. 41, Laws of 1865), conferring upon boards of supervisors power to borrow money on the credit of their respective counties to pay bounties, etc., and to execute obligations for its payment, the power so conferred was not intended to be limited to a single exercise thereof, but said board was authorized to borrow money and to renew the county obligations from time to time for the purpose of paying or continuing the indebtedness created under said acts. *Parker v. Bd. Suprs.* 392

BROOKLYN (CITY OF).

1. Under the provision of the charter of the city of Brooklyn of 1873, (§§ 9, 14, title 13, chap. 863 Laws of 1873), as amended by the act of 1874 (§ 20, chap. 580 Laws of 1874), specifying the causes for which members of the Department of Fire and Buildings in the

ration of six months from the date of such default." In an action for the conversion of two of said bonds a statement of facts was agreed upon to the effect that the bonds in question were stolen from plaintiff in 1876 and were purchased by defendants in 1881; that no interest had been paid thereon for the years 1877, 1878 and 1879, "and the defaults have never been made good," nor had any contribution been made to the sinking fund; that a suit for the foreclosure of the mortgage "because of the above mentioned defaults" had been commenced, which was still pending; that a receiver of the company was appointed in 1876. *Held*, that the bonds at the time of defendants' purchase were overdue; and, as it did not appear they purchased of a *bona fide* holder who purchased before maturity, plaintiff was entitled to recover; that the language of the statement implied that a demand of payment of interest was made, or that the company had done something which dispensed with its necessity; but, in any event, a default in making the stipulated payments into the sinking fund was clearly stated. *Id.*

4. Plaintiff conveyed to his son I., certain premises by deed with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and without the knowledge or consent of plaintiff, executed to defendant McK. a mortgage for \$5,000, the consideration therefor being partly certain claims held by McK. against I. and the balance a check payable to the order of I., which he transferred on the same day to plaintiff. McK. had knowledge at the time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter

McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was at the time of such assignment in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. *Held*, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and the burden of proving good faith in the transaction was upon him, and in the absence of such proof, plaintiff was entitled to the relief sought. *Seymour v. McKinstry.* 230

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2. Also, *held*, that assuming default in the payments of interest or into the sinking fund, would not render the principal of the bonds due, without some action on the part of the bondholders or the trustees under the mortgage showing an election to consider it due (as to which *quære*), the action to foreclose based upon both defaults showed such an election. *Id*.

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BROOKLYN (CITY OF).

1. Under the provision of the charter of the city of Brooklyn of 1873, (§§ 9, 14, title 13, chap. 863 Laws of 1873), as amended by the act of 1874 (§ 20, chap. 589 Laws of 1874), specifying the causes for which members of the Department of Fire and Buildings in the

city of Brooklyn may be dismissed before there can be any conviction and removal, the member proceeded against is entitled to notice of the charge against him, a hearing and trial. *People ex rel. v. Comrs. F. and B.* 64

2. Where, therefore, it appeared by the affidavit, writ and return herein, that the relator was, without trial or hearing, dismissed by the commissioners of said department from the position of detailed fireman and member of the department. *Held*, that the proceedings of the commissioners were erroneous and void. *Id.*

3. The provision of the act of 1812 (§ 2, chap. 320, Laws of 1872), in relation to rates and wharfage, etc., in the cities of New York and Brooklyn, which authorizes a charge specified for goods remaining on a wharf for every day after the expiration of twenty-four hours from the time of landing, does not prohibit the owner of a private wharf from contracting for the landing or deposit of goods upon his wharf on such terms as may be agreed upon, or require him to store goods for any time without compensation. *Woodruff v. Havemeyer.* 129

4. Under the act of 1861 (Chap. 340, Laws of 1861), providing for a public park for the city of Brooklyn, the city acquired a fee in the lands taken, impressed with a trust, of which the legislature could relieve the city. *City of Bklyn. v. Copeland.* 496

5. Plaintiff's complaint herein alleged, in substance, that, under the provisions of said act it became and still is the owner in fee and possessed of certain land described in the complaint; that under a statute authorizing it (Chap. 378, Laws of 1870, as amended by chap. 795, Laws of 1873), a sale of said land was made to defendant and he entered into a contract to purchase, but that he has refused to take title or pay the purchase-money. Plaintiff asked for a specific performance. The answer admitted each and every

allegation of the complaint, except it denied that the statutes mentioned were competent to vest in plaintiff the ownership of the land in question. *Held*, that the allegation of ownership in the complaint was equivalent to an averment of compliance with the terms of the act of 1861, *i. e.*, that the commissioner's report was confirmed and payment made to the owners of the land, or their assent obtained by deed duly executed; that this averment was not denied by the answer, which simply put in issue the quantum of the estate acquired by the city; and as, if true, such averment would preclude the owners from thereafter questioning the validity of the act, its constitutionality could not be questioned here. *Id.*

6. On the trial plaintiff's counsel asked the counsel for defendant if it was admitted that the steps required by the act for the taking of lands had been taken; the latter replied that it was, except that no admission was made that awards for the lands were accepted by the owners under such circumstances as to operate as a voluntary grant, or to estop defendant from denying the sufficiency of the acts to vest title. *Held*, that this did not detract from the admission in the answer. *Id.*

7. By the terms of sale the park commissioners contracted to give a full covenant and warranty deed, except as to liens and debts imposed by legislative action; these the city assumed and agreed to discharge. *Held*, that the contract was valid. *Id.*

BURDEN OF PROOF.

1. The burden is upon one claiming under a title, acquired at a sale of an infant's real estate, to establish by affirmative evidence that every requirement necessary to give jurisdiction has been complied with; there is no presumption of compliance in the absence of proof. *Ellwood v. Northrup.* 173

2. The burden is upon the purchaser of stolen negotiable paper to show that he is, or has succeeded to the rights of, a *bona fide* purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue. *Northampton Nat. Bk. v. Kidder.* 221

8. Whenever the act of an agent is apparently authorized by the terms of his power, and is not, so far as a third person dealing with the agent can know, in excess of his authority, the act is presumptively within the authority, and the burden of proving that it was done after the authority was spent rests upon the principal. The burden is not met or the presumption overthrown by proof that in the course of the agent's dealings he fraudulently exceeded his authority; it must be shown that the particular transaction was unauthorized. *Parker v. B'd of Sup'rs.* 392

4. The law allows of no excuse to a common carrier for a wrong delivery of goods entrusted to him for transportation, except the fault of the shipper himself; and where there is any doubt, which may be determined by documentary evidence, its production should be required. *Furman v. Un. Pac. R. R. Co.* 579

BUTTER AND CHEESE FACTORIES.

1. The provision of the act of 1885 (§ 3, Chap. 183, Laws of 1885), "to prevent deception in the sale of dairy products," etc., which prohibits the selling or bringing of any milk, diluted with water or adulterated, to a butter or cheese manufactory to be manufactured, and declares a violation of the prohibition to be a misdemeanor is a valid exercise of legislative power. *People v. West.* 293

2. The provision does not make a fraudulent intent a necessary ingredient of the crime. *Id.*

3. *It seems* the said provision does not extend so far as to make it criminal for a dairyman conducting a butter or cheese manufactory and manufacturing from milk exclusively furnished by himself, to supply the factory with milk from his own cows mixed with water. *Id.*

CARRIER.

See COMMON CARRIER.

CASES REVERSED AND DISTINGUISHED.

Sisson v. Cummings (35 Hun, 22) reversed. *Sisson v. Cummings.* 53

Scott v. Elmendorf (12 J. R. 315) distinguished. *Starin v. Mayor, etc.* 87

Brady v. Mayor, etc. (1 Sand. Sup. Ct. R. 569) distinguished. *Starin v. Mayor, etc.* 87

Rooney v. S. A. R. R. Co. (18 N. Y. 368) distinguished. *Starin v. Mayor, etc.* 88

Norton v. Dreyfuss (19 J. & S. 491) reversed. *Norton v. Dreyfuss.* 90

Holdsworth v. De Belaunzaran (34 Hun, 382) reversed. *Holdsworth v. De Belaunzaran.* 119

Rogers v. Sinsheimer (50 N. Y. 646) distinguished. *Griffiths v. Morrison.* 170

Railway Co. v. Sprague (103 U. S. 756) distinguished. *Northampton Nat. B'k v. Kidder.* 227

Morgan v. United States (113 U. S. 476) distinguished. *Northampton Nat. B'k v. Kidder.* 227

Simpson v. Del Hoyo (94 N. Y. 180) distinguished. *Seymour v. McKinstry.* 237

Kimberly v. Patchin (19 N. Y. 330) distinguished. *Anderson v. Read.* 345

Briggs v. Sizer (30 N. Y. 64.) distinguished. *Anderson v. Read.* 348

Knights v. Wiffen (L. R., 5 Q. B. 600) distinguished. *Anderson v. Read.* 353

Greany v. L. I. R. R. Co. (101 N. Y. 419) distinguished. *Woodard v. N. Y., L. E. & W. R. R. Co.* 375

Wallace v. Loomis (97 U. S. 146) distinguished. *Raht v. Attrill.* 436

Fosdick v. Schall (93 U. S. 235) distinguished. *Raht v. Attrill.* 436

Barton v. Barbour (104 U. S. 136) distinguished. *Raht v. Attrill.* 436

Mittenberger v. Logansport R. Co. (106 U. S. 286) distinguished. *Raht v. Attrill.* 436

Un. T. Co. v. Souther (107 U. S. 591) distinguished. *Raht v. Attrill.* 436

Burnham v. Bowen (111 U. S. 776) distinguished. *Raht v. Attrill.* 436

U. T. Co. v. Ill. Mid. R. R. Co. (117 U. S. 434) distinguished. *Raht v. Attrill.* 436

Newman v. Suprs (45 N. Y. 676) distinguished. *First Nat. B'k v. Bd. Suprs. Saratoga Co.* 493

Bridges v. Suprs. (92 N. Y. 570) distinguished. *First Nat. B'k v. Bd. Suprs. Sar. Co.* 493

B'klyn Park Comrs. v. Armstrong (15 N. Y. 234) distinguished. *City B'klyn v. Copeland.* 500

People v. Willett (102 N. Y. 251) distinguished. *People v. Lumar.* 511

People v. Knickerbocker L. Ins. Co. 43 Hun, 571) reversed. *People v. Knickerbocker L. Ins. Co.* 619

Castle v. Noyes (14 N. Y. 329) distinguished. *People v. Knickerbocker L. Ins. Co.* 624

Jay v. De Groot (2 Hun, 205) distinguished. *People v. Knickerbocker L. Ins. Co.* 624

Hone v. De Peyster (44 Hun, 487) reversed. *Hone v. De Peyster.* 645

Baine v. City of Rochester (85 N. Y. 52) distinguished. *Gage v. Village of Hornellsville.* 667

CAUSE OF ACTION.

1. Any person who invades the rights of the owner of a ferry franchise by running a ferry himself, is liable for any damages he thus causes the owner and may be restrained by the court. *Mayor, etc. v. Starin.* 1

2. *It seems*, however, the courts will not restrain the operation of a ferry which is demanded by the public convenience simply because the franchise belongs to another, who neglects or refuses to use it. *Id.*

— *Assignee of covenant by a vendor of stock, good will, etc., of a business, that he will not engage in same business within certain bounds, may maintain action to restrain breach of covenant.*

See D. M. Co. v. Roeber. 473

CERTIORARI.

1. Under the provision of the Code of Civil Procedure in reference to a hearing upon return to a writ of certiorari (§ 2138), which provides that the hearing must be had "upon the writ and return and the papers upon which the writ was granted," where the return admits the facts stated in the writ, or the papers upon which it was granted, or is silent as to them, such facts must be considered and have effect upon the hearing. *People ex rel. v. Comrs. Dept. F. & B.* 64

2. *It seems* where the return meets all the allegations of fact contained in the writ and the papers upon which it was granted and traverses

them, the hearing must be confined to the facts stated in the return. *Id.*

8. Where the determination of an inferior tribunal, brought up for review by *certiorari*, has been reversed by the court granting the writ as against the weight of evidence, and the evidence is such that the court, guided by the rules governing it on application to set aside the verdict of a jury, would have power so to do, the decision is not reviewable here. *People ex rel. v. Bd. Fire Comrs.* 257

4. The provision of the Code of Civil Procedure (§ 2140), specifying the questions involving the merits which may be determined by the court on return to a writ of *certiorari*, has no application to a hearing on appeal to this court, and in no way enlarges its jurisdiction; it is confined in its operations to the court in which the hearing is originally had. *Id.*

5. *It seems* that, in a case involving a plain violation of the well-known rules governing applications for a new trial on the ground that the verdict is against the weight of evidence, or where it can be seen that there was an abuse of the discretion of the court below in its decision on such a hearing, this court may review the decision. *Id.*

6. In proceedings on writs of *habeas corpus* and *certiorari* it appeared that a female child was committed to the custody of defendant for an assumed violation of the provision of the Penal Code (§ 29) relating to the abandonment of children. The only evidence in the record, of the proceedings before the justice, was the complaint and the commitment; in the former she was charged with having been found "improperly exposed and neglected and wandering" in a public park "without any proper guardianship," and the commitment recited that the material allegations of the complaint were established. *Held*, that the complaint did not bring the case within the said provision, as it was not alleged that she was so exposed by those having her in

charge. *People ex rel. v. N. Y. C. Protectory.* 604

7. The complaint also charged "that the said child was found in the company of * * * who is a reputed prostitute," in violation of the provisions of the Penal Code. The return to the writs simply averred its incorporation, and that, by virtue of defendant's charter and section 293 of the Penal Code, the child was committed to its custody under a commitment, a copy of which was annexed, which recited that the conviction proceeded upon proof of the charge made. The relator traversed the return, alleging, in substance, that the child had done no act prohibited by the Penal Code, but was in the park at the time charged for an innocent and lawful purpose, and having parents with whom she resided. Defendant demurred to this traverse. *Held*, that the complaint followed substantially the language of the fourth subdivision of said section and was sufficient as matter of pleading; that the averments in the traverse admitted by the demurrer might show that the child was wrongfully convicted, but it could not be inferred therefrom that there was no evidence before the magistrate justifying the conviction; and that a retrial upon the merits could not be had in these proceedings. *Id.*

8. A summary conviction may not be set aside on *habeas corpus* or *certiorari* on averments and proof that the fact proved before the magistrate, on which the conviction depended was not true. *Id.*

9. The court below, on granting or affirming an order of discharge in such proceedings, has no authority to allow costs. *Id.*

10. The act of 1880 (Chap. 269, Laws of 1880), providing for the review of assessments by *certiorari*, regulates that subject and renders inapplicable to such case the provision of the Code of Civil Procedure (§ 2120 *et seq.*) in reference to the writ of *certiorari*. *People*

ex rel. v. Assessors Town of Greenburgh. 671

— *As to whether determination of officers empowered by the act, creating the board of railroad commissioners to make assessments for salaries and expenses, is reviewable on certiorari, supra.*

See People ex rel. v. Chapin. 265

[CHARTER-PARTY.

1. Defendants chartered a vessel for a voyage from New York to Cadiz; they to pay to plaintiff a sum specified on delivery of the cargo at Cadiz, "in cash, without credit, discount or commission." Plaintiff performed the obligations of the charter party on his part. Defendants' agent at Cadiz, who had funds in his hands to pay the freight, having been advised by plaintiff that he desired to remit a portion of the same, stipulated to his principal, agreed to purchase and remit a bill of exchange for the amount, and thereafter represented that he had so done, and defendants, relying upon such statement on payment of the balance, settled with the said agent, who had not, in fact, made the remittance as agreed, but instead thereof had drawn and transmitted his own draft on defendants, payable sixty days after sight for the amount, which draft defendants refused to accept or pay. Said agent had no authority to draw on defendants and had no funds in their hands. Plaintiff did not know that such draft was drawn until after he left the port of Cadiz and never agreed to accept it, but supposed the remittance was made as agreed. In an action to recover the amount of freight unpaid, *held*, that defendant was entitled to judgment; that although plaintiff assented to a mode of payment different from that stated in the charter party, yet as the condition upon which the assent was given was not performed, it did not constitute in any sense a payment of defendants' debt. *Holdsworth v. De Belaunzaran.* 119
2. *It seems* that if plaintiff had accepted the personal draft of the agent, or had extended to them a credit for the sum, in satisfaction of defendants' obligation, it would have operated as a discharge. *Id.*
3. Where a charter-party is not under seal it is competent to prove, by evidence *aliunde*, that the charterers named therein, and who executed it, did so not only for themselves but also for others who were jointly interested with them as principals; and an action is maintainable thereon against all the parties so interested. *Woodhouse v. Duncan.* 527
4. In an action upon a charter-party it appeared that it was executed by defendants, D. & P., on behalf of themselves and the other defendants who were jointly interested with them as charterers. The answer set up, as a counterclaim, damages alleged to have resulted from a breach of an agreement in the charter-party on the part of plaintiffs. On the trial plaintiffs gave in evidence the judgment record in a suit in admiralty brought by D. & P. against the vessel and its owners to recover damages for the same alleged breach of contract. The record showed the libel was dismissed on the ground that the owners "had kept and performed all the covenants and undertakings in the said charter-party contained on their part." *Held*, that the said judgment was conclusive, not only against D. & P., but upon those whom they represented and who were in privity with them, although they were not made parties. *Id.*
5. The answer alleged that three other persons were interested with defendants in the adventure and were necessary parties. It appeared that the three persons named had some interest, but it did not appear that plaintiffs knew of it at the time the charter-party was executed, nor was it proved that the interest was that of partners or joint contractors with defendants. *Held*, that the omission to make the three persons specified

defendants was not a sufficient ground for reversal; that if at the time of making the contract the persons named were not known to plaintiffs to be joint contractors, it was not necessary to make them parties; that it was not sufficient to show that plaintiffs knew said persons had some interest in the adventure; it was requisite to prove knowledge that they were members of a firm or joint contractors with defendants. *Id.*

CHATTEL MORTGAGE.

1. In January, 1883, M. made an assignment for the benefit of creditors. Among the property assigned were certain stereotype and electrotype plates then in the possession of L. & D., as custodians for M., upon which was a chattel mortgage, which was not filed until the day of the execution of the assignment. In March, 1883, L. & D. recovered a judgment against M. for a debt accruing prior to January, and attempted to levy upon the plates by virtue of an execution issued thereon. By an order made in this action the assignee was removed and a receiver, *pendente lite*, of the assigned property appointed. In proceedings instituted by the receiver against L. & D., who had refused to deliver up the plates, it was adjudged that said firm had no lien, and that the receiver was entitled to possession. The plates were thereupon, and previous to July, 1883, delivered to the receiver. In March, 1884, the receiver applied *ex parte* for directions as to the disposition of the property, and an order was thereupon made directing a sale of the plates and payment of the mortgage debt out of the proceeds; this the receiver did. In November, 1884, L. & D. petitioned to have the *ex parte* order vacated so far as it directs the payment of the mortgage. *Held*, that the petition was properly denied; that as, at the time of the sale, L. & D. had no lien upon the property, their remedy, if any, was to obtain an order of the court directing as to

the disposition of the proceeds, and until this was done it was the duty of the receiver to proceed under the order of the court; that when the mortgage became payable the mortgagee, in the absence of fraud, became entitled, as against the mortgagor and his representatives, and all other persons who had not acquired liens, to demand, receive and sell the mortgaged property; that after waiting a reasonable time to enable the petitioners to, take steps, if they desired, to establish a right to the property, it was the duty of the receiver to apply for and take the directions of the court, and he was under no obligation to give notice to the general creditors; and that the petitioners having laid still from July, 1883, to November 1, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property, if they had any equitable interest (as to which *quære*), they had lost it by their laches. *Sullivan v. Miller.* 635

2. The general creditors of a mortgagor of chattels have no right to assail the mortgage as invalid until they have secured a lien thereon by a levy under judgment and execution, or in some way have acquired a legal or equitable interest therein. *Id.*

CODES.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
PENAL CODE.

CODE OF CIVIL PROCEDURE.

§ 246.	<i>Hone v. De Peyster.</i>	645
§ 452.	<i>Johnson v. Donnan.</i>	269
§ 884.	<i>People v. Schuyler.</i>	298
§ 870, 873.	<i>Jenkins v. Putnam.</i>	273
§ 1268.	<i>W. P. Bank v. Gerry.</i>	467
§ 1294.	<i>Hyatt v. Dusenbury.</i>	668
§ 1508.	<i>Sisson v. Cummings.</i>	56
§ 2188.	<i>People ex rel. v. Com'rs.</i>	64
§ 2140.	<i>People ex rel. v. Bd. Fire Com'rs.</i>	257
§ 8245.	<i>Gage v. Village of Horellsville.</i>	667

CODE OF CRIMINAL PROCEDURE.

- §§ 275, 278. *People v. Dumar.* 502
 § 399. *People v. Elliott.* 288

COMMON CARRIER.

- 1 While bills of lading are not negotiable in the sense applicable to commercial paper, they are transferable and carry with them the ownership, either general or special, of the property described; the carrier, unless he has limited his liability by stamping his bills as "not negotiable," is bound to know that their office and effect is not limited to the person to whom they are first and directly issued, to recognize the validity of transfers, and to deliver the property only on the production and cancellation of the bills. *Bk. Butaria v. N. Y., L. E. & W. R. R. Co.* 195
2. A carrier corporation, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one, who, upon transfer by the shipper upon the faith of the bill, has, in good faith, discounted a draft drawn upon the consignee, although no property was in fact delivered. *Id.*
3. No privity is necessary in such a case to make the estoppel available, other than that which flows from the wrongful act of the agent and the consequent injury. *Id.*
4. One of defendant's local freight agents, having authority to receive and forward freight and to give bills of lading, specifying the terms of shipment, but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to one W., describing them as received to be forwarded to C., as consignee, but adding, with reference to the packages, "contents unknown." W. drew a draft on the consignee which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were, in fact, shipped by W., or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused. In an action upon the bills of lading, *held*, that defendant was liable; and that the recital in the bills that the contents of the packages were unknown was no defense. *Id.*
5. Where actual shipment has been made the presumption is that the property delivered corresponds with that described in the bill of lading, and where a bill is issued without the delivery of the property the carrier cannot defend against the wrong by presuming if it had not occurred another would have taken its place. *Id.*
6. Where a consignor of goods delivered to a common carrier for transportation, although not the general owner, has a lien upon or a special interest in the goods and makes the contract and pays the freight, he may bring an action for breach of the contract in his own name. *Swift v. Pacific M. S. S. Co.* 26
7. Where, therefore, the owners of whaling vessels were the consignors and consignees of a quantity of oil and paid the freight thereon, *held*, the fact that the seamen on the vessels had an interest in the proceeds of the sale of the oil did not make them necessary parties to an action against the carrier for breach of contract. *Id.*
8. A corporation carrying over a portion of a continuous line of transportation, may contract to carry beyond the terminus of its route. *Id.*
9. It may also contract to receive goods away from its terminus, to be transported to such terminus over the route of another carrier, and then to be forwarded over its route, when the making of such a contract is in the prosecution of

- and incidental to its corporate business. *Id.*
10. *It seems* this right of a corporate carrier to go beyond its terminus to procure freight is not absolute and unqualified. It must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incidental to its legitimate corporate business. *Id.*
11. Two corporations, each carrying over a portion of a continuous route, may enter into joint contracts for transportation. *Id.*
12. Defendant, the P. M. S. Co., was organized to navigate steamships on the Pacific and Atlantic Oceans (Chap. 207, Laws of 1850.) Its line connected at Panama on the Pacific and at Aspinwall on the Atlantic with the road of defendant, the P. R. R. Co., which was operating under its charter a railroad between those places. In an action upon a joint contract made by the two corporations for the transportation of a quantity of oil from Panama to New York, *held*, that defendants had power to make the contract and were jointly liable for a breach thereof. *Id.*
13. The parties made a special contract as to the transportation of the oil. Two months after its delivery at Panama the common agent of the defendants here, executed bills of lading which were sent to plaintiffs, but were not received until after the oil had left Aspinwall. The contract, as set forth in the bills, was different from that actually made. *Held*, that defendants could not alter or abrogate the contract actually made, by issuing the bills of lading; and, in the absence of proof establishing that plaintiffs consented to accept the bills in place of the prior contract, the latter must control. *Id.*
14. The damage complained of was caused by unjustifiable delay and carelessness while the oil was in the possession of the railroad company. *Held*, that conceding the contract for transportation was made with the steamship company alone, then defendants were severally liable, the railroad company as common carrier upon general principles, the steamship company under the special contract. *Id.*
15. The law allows of no excuse to a common carrier for a wrong delivery of goods entrusted to him for transportation, except the fault of the shipper himself; and where there is any doubt, which may be determined by documentary evidence, its production should be required. *Furman v. Union Pacific R. R. Co.* 579
16. It is the duty of a carrier, at common law as well as under the factors' act of this State, to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming under that title, and to deliver in accordance with it; if delivery is made without it he runs the risk of showing a delivery in accordance with its instructions. *Id.*
17. Plaintiff's assignees delivered to the B. S. P. Co., at Norfolk, Va., 100 bags of peanuts, marked "Y," for shipment to Denver, receiving a bill of lading, in which, after specifying the property, the weight and freight, was the following: "Marked Y, order notify Zucca Bros." In the course of transportation the peanuts were delivered to defendant. It received no bill of lading or copy thereof from the preceding carrier and was not notified that any had been issued. It received a "transfer sheet" which contained this entry: "Consignee 'Y' Hup Zucca Bros." The same entry was made in the way-bill made up by defendant's agents at the forwarding station, but under a column therein headed "consignee and destination," the destination but no consignee was given. Defendant received no other notification as to the ownership or disposition of the goods. It delivered them at Denver to Zucca Bros., without the production or surrender of the bill of

lading. That firm had no title to or interest in the goods and had refused to pay a draft drawn upon them by the shippers, forwarded for collection, which was attached to the bill of lading; these papers had, in consequence, been returned to the shippers. *Held*, that defendant, upon failure to deliver to plaintiff on demand, became liable for a conversion of the goods; that the use of the word "notify" in the bill of lading showed that Zucca Bros., were not intended as the consignees, and as none were named, no delivery could be safely made without production of the bill. *Id.*

18. *It seems* that a carrier receiving goods from another carrier is not justified in a delivery to the wrong person without a bill of lading, where one was made, although the delivery was in accordance with the papers received from the preceding carrier in which a different consignee is named from the one named in the bill. *Id.*

See BILL OF LADING.

RAILROAD CORPORATIONS.

CONDITIONS.

1. Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor; the possibility of reverter merely is not an estate in land. *Vail v. L. I. R. R. Co.* 283
2. A deed conveyed, for a valuable consideration expressed, a certain strip of land described therein to a town and its "assignees forever," with covenants of warranty. Following the description was the following: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." *Held*, that the deed conveyed the fee of the land, not an easement merely; that the clause restricting the use operated at most

as a condition subsequent, and until the contingency happened the whole title was in the grantee. *Id.*

CONFLICT OF LAWS.

- A remedy given by the statutes of another State to creditors of a corporation against its stockholders is not available here. *Christensen v. Eno.* 97

CONSIGNOR AND CONSIGNEE.

1. Where a consignor of goods delivered to a common carrier for transportation, although not the general owner, has a lien upon or a special interest in the goods and makes the contract and pays the freight, he may bring an action for breach of the contract in his own name. *Swift v. Pacific M. S. S. Co.* 206
2. Where, therefore, the owners of whaling vessels were the consignors and consignees of a quantity of oil and paid the freight thereon, *held*, the fact that the seamen on the vessels had an interest in the proceeds of the sale of the oil did not make them necessary parties to an action against the carrier for breach of contract. *Id.*

CONSPIRACY.

- An action to recover damages caused by conspiracy may be maintained against a corporation. *Buffalo L. Oil Co. v. Standard Oil Co., N. Y.* 669

CONSTITUTIONAL LAW.

1. The provisions of the railroad act of 1869 (§ 4, chap. 907, Laws of 1869), directing and providing for the application of taxes assessed upon any railroad in a town, city or village, toward the redemption of bonds issued by the municipality to aid in the construction

of such railroad, are not in conflict with any constitutional provision. *In re Clark v. Sheldon*. 104

2. They do not impose a tax upon property in other portions of the county for the benefit of the town, city or village; they simply deprive such other portions of the benefit derived from the taxation of railroad property in the municipality. *Id.*

3. They are not violative of the provision of the State Constitution (§ 8, art. 7), prohibiting the payment out of the treasury of the State of any moneys, except in pursuance of an appropriation, etc.; as the fund realized from such taxation does not belong to the State or go into its treasury. *Id.*

4. They are not repugnant to the constitutional provision (§ 20, art. 3), declaring that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied; the said provision simply specifies what may be done with a tax which has been legally imposed. *Id.*

5. The provision of the act of 1885 (§ 3, chap. 183, Laws of 1885) "to prevent deception in the sale of dairy products," etc., which prohibits the selling or bringing of any milk, diluted with water or adulterated, to a butter or cheese manufactory to be manufactured, and declares a violation of the prohibition to be a misdemeanor, is a valid exercise of legislative power. *People v. West*. 293

6. It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted. *Id.*

7. An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed in the title. *Id.*

8. The provision of the act of 1874 (§ 8, chap. 547, Laws of 1874) constituting the board of examiners

of buildings in the city of New York, is not violative of the provision of the State Constitution (§ 2, art. 10) requiring all city officers, whose election or appointment is not provided for by the Constitution, to be elected by the electors of the city, or appointed by the authorities thereof designated by the legislature for that purpose. The members of the board are not, as such, city officers. *Fire Dept. v. Atlas S. S. Co.* 586

— *Act prohibiting sale of adulterated milk (chap. 183, Laws of 1885) constitutional.*

See People v. Kibler.

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CONSTRUCTION.

1. The rule requiring all gratuitous grants by the sovereign of exclusive privileges and franchises to be construed strictly, and that any ambiguity therein must operate against the grantee, is not in its strictness fully applicable to the grant of a ferry franchise. Such a grant is never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry, with suitable accommodations for the convenience of the public. *Mayor, etc. v. Starin*. 1

2. The rule also does not apply to grants to the city of New York under the Montgomerie charter, as by the terms of the charter itself it is in all things to "be construed * * * benignly and in favor of and for the most and greatest advantage, profit and benefit" of the city. *Id.*

3. While, if a practical construction by the parties interested, of ambiguous language in such a grant, as evidenced by their acts, has been uniform, it is entitled to great, if not controlling weight, if it has not been uniform, and such acts indicate conflicting views, they furnish no aid in arriving at the meaning. *Id.*

4. The omission of the city to assert

its rights under the charter, or passive submission to the invasion thereof, *held* to have but little bearing in the construction of the grant; but that the acts of the city in asserting and exercising its rights from time to time, claiming the exclusive franchise, conclusively showed its understanding of its rights under the charter. *Id.*

5. For the purpose of ascertaining the interest of parties in making a contract, invalid as well as valid, provisions in the contract may be resorted to. *Nearpass v. Newman.* 47
6. The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defense. *Lewis v. Barton.* 70
7. Rules as to construing descriptive words in a deed where the particulars are inconsistent, stated. *Case v. Decker.* 548

— Penal statutes to be construed strictly.

See Whitaker v. Masterton. 277

CONTRACTS.

1. F., for the purpose of making provision for the support of his wife and children, entered into a tripartite agreement with her and J., as trustee, whereby he conveyed to J., certain land, in trust, to sell and convey the same, invest the proceeds and pay the income to her during her life. Subsequently the same parties entered into another agreement, which recited that F. desired to make still further provision for his wife and children, and for that purpose, on condition that the wife should perform certain covenants therein contained on her part, he agreed to quit-claim to J., "all his right, title and interest to and in" said land, and to pay J. \$300 a year for the support and education of each of two of said children until they respectively became of age; the deed and bill of sale to be put in escrow, to

be delivered and to become operative and in full force and effect when the covenants on the part of the wife were performed; but to be returned to F., if not so performed. A quit-claim deed was executed by F., as agreed. J., thereafter sold the land, and with a portion of the proceeds purchased a house and lot, which, by the terms of the deed, were conveyed to him "as trustee by and under a deed of trust" from F., and his wife; the balance was invested in U. S. bonds. Subsequently the same parties, with defendant F. N., Jr., as party of the fourth part, entered into an agreement which recited the receipt by J., under the first deed of trust, of certain property "in trust for certain purposes therein mentioned" the sale of said property and the investment of the proceeds as stated, that said defendant was to be substituted as trustee in place of J., and the conveyance by the latter to said defendant of said house and lot and delivery of the bonds. By the terms of the agreement, in consideration of the transfer, F., and wife released J., from all claims and demands, and said defendant agreed to take said house and lot "and hold the same as trustee pursuant to the covenants and conditions in said trust deed contained in the place" of J. By the conveyance referred to, J., "individually and as trustee," conveyed all his "right, title and interest in and to the house and lot to said defendant as trustee in place and stead" of J., "under said deed of trust." Said defendant thereafter acted as trustee until the death of the wife, which occurred after the two children named became of age. F. thereafter claiming a reversionary interest in the property so held by said defendant, conveyed the same to plaintiffs. In an action to recover possession of said property, *held*, that the effect of the first deed and trust agreement was to create a valid trust in J.; that the reversionary interest in the land remained in the creator of the trust and on the death of his wife reverted to him; that the

land so conveyed was not exempted from the limitations and conditions of the trust by the subsequent deed and agreement between the same parties; that said limitations and conditions followed the property into which the estate was converted, and it became subject to the same rule of reversion; and that, therefore, the *corpus* of the trust estate reverted to F., and passed under the conveyance from him to plaintiff. *Nearpass v. Newman.* 47

2. Also, *held*, that whatever effect might be ascribed to the quit-claim deed from F. to J., all of the interest thereby conveyed was reconveyed to said defendant F. N., Jr., by the last agreement, the original trust was redeclared and the whole property reconstituted a trust fund, subject to the limitations and conditions of the original agreement. *Id.*

3. For the purpose of ascertaining the interest of parties in making a contract, invalid as well as valid, provisions in the contract may be resorted to. *Id.*

4. Where a wife authorizes her husband to contract in matters relating to, and for the benefit of her separate estate, and in executing such a contract to use the name of a firm ostensibly composed of herself and her husband, she is liable upon an obligation so executed; and this, without regard to the question as to whether such a firm in fact exists, or as to whether as matter of law they were capable of assuming the relation of co-partners. *Noel v. Kinney.* 74

5. In an action to recover the purchase-price of goods manufactured for and delivered to defendant, the defense was that the goods were not such as the contract called for. The evidence on trial was conflicting as to the terms of the contract, the quality of the goods and their fitness for the use intended, and as to whether they corresponded with those ordered. It appeared that plaintiff manufactured and delivered goods in quantity corresponding with the order; that,

some faults in their quality having been alleged, he received them back and attempted to remedy the alleged defects and finally redelivered the whole quantity to defendant; that defendant still claimed that they did not correspond with the articles plaintiff contracted to make, and when the latter demanded payment refused, and that thereupon plaintiff demanded a return of the goods, to which defendant replied that he would not give them up, as he wished to consult counsel as to his right to keep them for reimbursement of damages. The trial court thereupon ordered judgment for plaintiff, holding that the refusal to return the goods amounted to an acceptance under the contract. *Held*, error; that the question was one of fact for the jury. *Norton v. Dregguss.* 90

6. A corporation, carrying, over a portion of a continuous line of transportation, may contract to carry beyond the terminus of its route. *Swift v. Pacific M. S. S. Co.* 206

7. It may also contract to receive goods away from its terminus, to be transported to such terminus over the route of another carrier, and then to be forwarded over its route, when the making of such a contract is in the prosecution of and incidental to its corporate business. *Id.*

8. *It seems* this right of a corporate carrier to go beyond its terminus to procure freight is not absolute and unqualified. It must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incidental to its legitimate corporate business. *Id.*

9. Two corporations, each carrying over a portion of a continuous route, may enter into joint contracts for transportation. *Id.*

10. Defendant, who was engaged in the manufacture in this State, and sale throughout the States and territories, of friction matches, sold his manufactory, stock, fixtures,

- trade, trade-mark and good will of the business, to a corporation then engaged in the same manufacture in the States of Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant, on the part of defendant, with the purchaser "and assigns" that he would not, at any time within ninety-nine years, engage in such manufacture or sale, except in the service of the purchasing company within any of the States or territories, except Nevada and Montana; defendant also, at the same time executed to the purchaser a bond in the penalty of \$15,000, conditioned to pay that sum as liquidated damages in case of a breach of his covenant. In an action upon the covenant, *held*, that the restraint was partial, and not general, and that the covenant was valid; also, that the equitable jurisdiction of the court to enforce said covenant was not excluded by the fact that defendant, in connection with it, executed the bond. *Diamond Mutch Co. v. Roebor.* 473
11. *It seems* that, while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified. *Id.*
12. As to whether such a covenant is invalid, where the restraint is general, but, at the same time, is co-extensive only with the interest to be protected, and with the benefits intended to be conferred, *quære.* *Id.*
13. The motive of the covenantee is not the test of the validity of such a covenant. A party may legally purchase the trade and business of another for the very purpose of preventing competition, and its validity, if supported by a consideration, depends upon its reasonableness as between the parties. *Id.*
14. The question as to what is a general restraint of trade does not depend upon State lines; they are not the boundaries of trade and commerce, and a restraint is not necessarily general which embraces an entire State. *Id.*
15. Also *held*, that defendant was not in a position entitling him to raise the question that the contract was, on the part of the corporation, *ultra vires*; that having received the benefits thereof, he must abide by its terms. *Id.*
16. Also *held*, the plaintiff, as successor and assignee of the purchasing corporation was entitled to maintain the action; and the fact that it is a foreign corporation was no objection. *Id.*
17. The history of litigation upon the subject of contracts in restraint of trade showing the tendency of recent judicial opinion toward the relaxation of the old common law rule given, and the authorities, collated. *Id.*
19. No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other; and no obligation can be implied in law from a voluntary payment of the debt of another, without his request, by one who is under no legal liability or compulsion to make it. *First Nat. Bk. v. Board Supervisors.* 488
- See* BILL OF LADING.
CHARTER PARTY.
GUARANTY.
SALES.
- CONVERSION.
1. In an action for the conversion of a quantity of corn it appeared that plaintiff, who was the owner, consigned the corn to L. & Co., commission merchants, for sale. The latter delivered it to defendants, who advanced money on account of it. The court, after charging that defendants could keep the corn as security for the money advanced, provided they did not at the time know that plaintiff was the owner, charged that if, on the other hand, they knew that L. & Co., were using

plaintiff's property to raise money for themselves, they could not hold it, but stood in L. & Co.'s place. *Held*, no error. *Dorrance v. Dean*. 203

2. The O. & M. R. R. Co. issued certain mortgage bonds on their face payable April 1, 1911, with interest semi-annually, upon presentation and surrender of the corresponding interest coupons attached to the bonds. Each bond contained a clause to the effect that, in case of non-payment, when demanded, of any installment of interest and of its remaining unpaid for six months, or in case of default for six months in making any contribution to the sinking fund stipulated in the bond "the principal shall, without further demand or notice, become due or payable from and after the expiration of six months from the date of such default." In an action for the conversion of two of said bonds a statement of facts was agreed upon to the effect that the bonds in question were stolen from plaintiff in 1876 and were purchased by defendants in 1881; that no interest had been paid thereon for the years 1877, 1878 and 1879, "and the defaults have never been made good," nor had any contribution been made to the sinking fund; that a suit for the foreclosure of the mortgage "because of the above mentioned defaults" had been commenced, which was still pending; that a receiver of the company was appointed in 1876. *Held*, that the bonds at the time of defendants' purchase were overdue; and, as it did not appear they purchased of a *bona fide* holder who purchased before maturity, plaintiff was entitled to recover; that the language of the statement implied that a demand of payment of interest was made, or that the company had done something which dispensed with its necessity; but, in any event, a default in making the stipulated payments into the sinking fund was clearly stated. *Northampton Nat. B'k v. Kidder*. 221

3. Also, *held*, that assuming default

in the payments of interest or into the sinking fund, would not render the principal of the bonds due, without some action on the part of the bondholders or the trustees under the mortgage showing an election to consider it due (as to which *quære*), the action to foreclose based upon both defaults showed such an election. *Id.*

CORPORATIONS.

1. The unissued shares of stock of a corporation are not assets in its hands, and in the absence of any statutory provision, or provision of its charter, one to whom shares have been transferred by it gratuitously, does not, by accepting them, become a debtor to the company or make himself liable to pay the nominal face of the shares as upon a subscription for the stock or a contract, and an action is not maintainable against him by a creditor of the corporation to compel him to pay for such shares. *Christensen v. Eno*. 97
2. So, also, where bonds of a corporation have been issued by it gratuitously to a stockholder, but no portion of its property or assets has been applied in payment thereof, the stockholder is not liable to account to creditors for the proceeds of the sale of said bonds by him. *Id.*
3. A remedy given by the statutes of another State to creditors of a corporation against its stockholders is not available here. *Id.*
4. Where a corporation has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact to the prejudice of a third person who has dealt with the agent in good faith in reliance upon the representation. *Bk. Butavia v. N. Y., L. E. & W. R. R. Co.* 195

5. This rule applies as well where a corporation as where an individual is the principal. *Id.*

6. A carrier corporation, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill has, in good faith, discounted a draft drawn upon the consignee, although no property was in fact delivered. *Id.*

7. No privity is necessary in such a case to make the estoppel available, other than that which flows from the wrongful act of the agent and the consequent injury. *Id.*

8. An action to recover damages caused by conspiracy may be maintained against a corporation. *Buffalo L. Oil Co. v. Standard Oil Co., N. Y.* 669

— When party, having received the benefits of a contract with a corporation may not raise the objection that it was ultra vires.

See D. M. Co. v. Roeber. 478

See INSOLVENT CORPORATIONS.

INSURANCE (FIRE).

INSURANCE (LIFE).

MANUF'ING CORPORATIONS.

MUNICIPAL CORPORATIONS.

RAILROAD CORPORATIONS.

RELIGIOUS CORPORATIONS.

COSTS.

1. Where notice is served with the summons, that in case of default plaintiff will take judgment for a sum specified, this is his statement of the amount involved, and it is not for him to say on application for an extra allowance of costs that the notice is a nullity. *Adams v. Arkenburgh.* 615

2. In an action wherein such a notice was served, the complaint alleged a partnership between plaintiff and A., defendant's testator, an investment by the latter of specific amounts of the partner-

ship funds in the purchase of specified real estate and securities, the receipt by him of the rents and dividends, an approximate estimate of the amount of which was given, and also alleged that the income of the partnership received and so invested by A. and the dividends, interest and profits accruing from such investments amounted to not less than \$200,000. The judgment asked was for a dissolution of the partnership, an accounting of the partnership business, and of the investments, receipts of dividends, interest, etc., as specified in the complaint. Judgment was rendered in favor of defendants. An order of Special Term granting defendants an extra allowance was reversed by the General Term "on questions of law" only. *Held*, error; that one-half of the value stated in the complaint of the property, security, etc., specified as the assets of the partnership constituted the subject-matter involved and furnished a sufficient basis for the computation of an allowance; that the judgment was conclusive as to defendant's right to retain the same; and that a case was made out authorizing the court below to exercise its discretion as to an extra allowance. *Id.*

3. In an action by an executor upon a claim, alleged to be due the estate, arising out of transactions between the testator and another, in such an action the executor, unless mismanagement or bad faith is shown, is not chargeable individually with costs. (Code of Civil Pro., § 240.) *Hone v. De Pyster.* 645

4. The rule is not changed by the fact that the executor is beneficially interested in the estate as residuary legatee. *Id.*

5. It is the duty of the court, in an action brought by an executor as such, to determine the question as to his individual liability for costs, in case he is defeated; and where he is by the judgment charged with costs in a representative capacity alone, this impliedly determines that he is not liable

individually; the decision is final and conclusive unless it is subsequently reversed or set aside by a direct proceeding for that purpose.

Id.

6. He may not, therefore, be charged with such costs in a collateral proceeding. *Id.*

7. The provision of the Code of Civil Procedure (§ 8245), prohibiting the allowance of costs to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for money only, unless the claim was before the commencement of the action presented for payment to the chief fiscal officer of the corporation, does not apply to an action for the recovery of damages for injuries caused by the negligence of the servants of the corporation. *Gage v. Village of Hornellsville.* 667

— The court has no authority to grant costs in granting or affirming an order of discharge in proceedings by habeas corpus or certiorari to review order of arrest under provision of Penal Code (§ 291), in reference to abandonment of children.

See *People ex rel. v. N. Y. C. Protectory.* 604

COUNTIES.

1. It seems any authority given to a county by the legislature to extend its indebtedness, includes the power to do it by borrowing money and substituting new obligations in place of the old ones. *Parker v. Board Suprs.* 392.

2. The proportion of the State tax levied upon a county and charged to its treasurer is payable by him; not as the officer or agent of the county but as an individual, designated by his official name for the performance of specific duties, and the county is not responsible for his omissions or defaults in respect thereto save in the manner prescribed by law. *First Nat. Bk. v. Board Suprs.* 488

3. In case of the failure or neglect

of the county treasurer to pay over the taxes due the State, or to render an account thereof to the comptroller, it is not until the remedy against him and against his bail has been exhausted, and the loss by reason of that default has been thus ascertained, that the county is required to act or any duty is attached to it. (Chap. 427, Laws of 1853; chap. 393, Laws of 1863.) *Id.*

4. M., a county treasurer, being in default in the payment of the State tax levied upon his county, executed two notes in his name of office purporting to be by authority of the board of supervisors, but without any actual authority from that body. These notes were discounted by plaintiff, the proceeds credited in the individual account of M. and paid out on his checks to the State treasurer to apply on his account with that officer. *Held*, that an action was not maintainable against the board of supervisors to recover the amount as for so much money had and received by the county for its benefit and use; that the indebtedness to the State discharged by the money procured from plaintiff was not that of the county but of M.; but that conceding it to have been a county indebtedness, plaintiff, having voluntarily furnished M. with the means to discharge the debt without any request or promise to pay on the part of the county, did not thereby become its creditor, and no liability on its part was created. *Id.*

COUNTY TREASURER.

1. In November, 1866, the board of supervisors of S. county passed resolutions providing for raising, by taxation, a certain amount of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." The debt so provided for, termed the town bounty debt, at that time amounted to over \$500,000, represented by a large number of separate obligations, a large portion

- of which matured in February thereafter. No other provision was made for the payment of the maturing obligations. Similar resolutions were passed at each annual session of the board down to 1875. *Held*, that the authority given was to be construed in reference to the circumstances, and was not limited to an extension of the then outstanding obligations, but authorized the county treasurer to borrow money to pay them as they matured, and to issue new obligations in renewal of those then existing or for the new loans. *Parker v. Bd. of Sup'rs.* 392
2. In each year from 1865 to 1875, the accounts of the treasurer, which, with the vouchers accompanying them, showed that he had made new loans and issued new obligations, were audited without objection by a committee of the board. *Held*, the inference was irresistible that the board was cognizant of the facts, and its acquiescence in the assumption of power by the treasurer to borrow money and give new obligations as a means of extending the debt, was cogent evidence that the authority intended to be conferred included these transactions. *Id.*
 3. The town bounty debt, so-called, was incurred in pursuance of a resolution of the board of supervisors authorizing the borrowing of money on the credit of the county, to be disbursed for bounties on the order of the supervisors of the respective towns. The amount so drawn by each supervisor it was declared should constitute a debt of his town payable by taxation of its property. There was no vote of the electors of the town authorizing the debt as prescribed by the act of 1864 (§ 22, Chap. 72, Laws of 1864). *Held*, that the debt was legally a debt of the county, not of the several towns; but that the authority of the treasurer extended to it, and it was immaterial that it was not described in the resolution with legal accuracy. *Id.*
 4. In an action upon notes issued by the county treasurer to P., plaintiff's intestate, for moneys loaned, ostensibly to pay maturing obligations of the county, in pursuance of said resolutions of the board of supervisors and in renewal of notes so given, it appeared that there was a fraudulent over-issue of notes by the county treasurer to a large amount; that notes were outstanding at the time of the annual meeting of the board of supervisors in 1874 to the amount of \$128,631, while if the money raised by taxation had been honestly applied and he had borrowed only sufficient to extend the portion of the debt he was directed to have extended, the whole debt would have been but \$20,801. It did not appear that the treasurer misapplied any of the moneys for which the notes in suit were given, and at no time did the indebtedness the treasurer was authorized to extend fall short of the loans made by P., and the good faith of the lender was not questioned. *Held*, that the evidence failed to establish a defense to the notes; that as the authority given to the treasurer authorized transactions and dealings in form of the same precise character as those which took place between the treasurer and the payee of the notes, the presumption was that they were authorized; and if, in fact, they were not within the actual limits of the power, the burden was upon defendant to show it. *Id.*
 5. It was claimed that the resolutions of the board were invalid, because they assumed to delegate to the treasurer the judicial and legislative power of the board to determine the extent and amount of the liabilities of the county and to audit and allow the same. *Held*, untenable; as the authority was to extend a debt already existing, not to create a new debt, or to pass upon or allow a disputed or doubtful claim. *Id.*
 6. The proportion of the State tax levied upon a county and charged to its treasurer is payable by him; not as the officer or agent of the

county but as an individual, designated by his official name for the performance of specific duties, and the county is not responsible for his omissions or defaults in respect thereto save in the manner prescribed by law. *First Nat. Bk. v. Bd. Suprs.* 488

ity to aid in the construction of the railroad.

See In re. Clark v. Sheldon 104

COURT OF APPEALS.

See APPEAL.

CRIMINAL TRIAL.

7. In case of the failure or neglect of the county treasurer to pay over the taxes due the State, or to render an account thereof to the comptroller, it is not until the remedy against him and against his bail has been exhausted and the loss by reason of that default has been thus ascertained, that the county is required to act or any duty is attached to it. (Chap. 427, Laws of 1858; chap. 393, Laws of 1868.) *Id.*

8. M., a county treasurer, being in default in the payment of the State tax levied upon his county, executed two notes in his name of office purporting to be by authority of the board of supervisors, but without any actual authority from that body. These notes were discounted by plaintiff, the proceeds credited in the individual account of M. and paid out on his checks to the State treasurer to apply on his account with that officer. *Held*, that an action was not maintainable against the board of supervisors to recover the amount as for so much money had and received by the county for its benefit and use; that the indebtedness to the State discharged by the money procured from plaintiff, was not that of the county but of M.; but that conceding it to have been a county indebtedness, plaintiff, having voluntarily furnished M., with the means to discharge the debt without any request or promise to pay on the part of the county, did not thereby become its creditor, and no liability on its part was created. *Id.*

— *Duty of, under railroad act of 1869 (chap. 907), as to application of taxes assessed upon a railroad in a town, village or city toward the redemption of bonds, issued by the municipal-*

1. To meet the requirements of the provision of the Code of Criminal Procedure (§ 399), forbidding a conviction upon the testimony of an accomplice, unless "corroborated by such other evidence as tends to connect the defendant with the commission of the crime," it is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime or to connect the defendant with it; nor need such evidence be wholly inconsistent with the defendant's innocence; it is sufficient if there is some evidence fairly tending to connect the defendant with the commission of the crime; and it is then for the jury to determine whether the corroboration is sufficient to satisfy the jury of the defendant's guilt. *People v. Elliott.* 288

2. Defendant was indicted for forgery, charged as a second offense, in uttering a forged draft. An accomplice, who procured the money on the draft from a bank in the city of R., testified on the trial to the commission of the crime. It appeared by other evidence that defendant had been previously convicted of the crime of forgery, sentenced and served a term in State's prison; that he and the accomplice were acquaintances and associates in the city of New York; that he was in R. and at C., a place near R., some days prior to the commission of the crime, and registered at three hotels under an assumed name; that the accomplice was with defendant at C. and was introduced by him to a third person. The president of the bank testified that he thought he had seen de-

fendant in the bank. Defendant gave no explanation of his presence at R., and after his arrest declared that he did not know and had never seen the accomplice. Upon being arrested in New York he asked the detective if any one had been arrested in R., and upon being asked "why" he said "there must be somebody who had done some talking," and while denying that he committed the crime, said he knew who did it. *Held*, that there was sufficient corroboration to sustain a conviction. *Id.*

3. Upon the trial of an indictment for murder, where the defense was insanity, the prosecution called as a witness, B., who was a physician of the jail where defendant was confined for six months prior to the trial. B. testified that he was employed by the board of supervisors, and as such had medical charge of all prisoners in the jail; that he examined defendant at the request of both parties and "kept an eye on the case;" that he saw to the defendant, as he did to others, when he needed it. There was no proof that defendant was at any time sick during the six months, or that the witness was ever called to attend upon or prescribe for him as a physician. A hypothetical question was then put to the witness, from which was excluded all personal knowledge he had of the defendant, but which was based entirely on facts which occurred before defendant came to the jail, and the witness was requested to answer, without any reference to anything, except to the facts stated as to whether the defendant was sane or insane when he committed the act. The witness stated that it was very questionable whether in answering he could, and he was unwilling to say that he could, exclude the knowledge he had obtained while defendant was in jail. The question was objected to as incompetent under said provision and the witness allowed to answer. He answered "sane." *Held* (RAPALLO and ANDREWS, J.J., dissenting), that the evidence was competent; that even if the wit-

ness was influenced by the knowledge he acquired by seeing the defendant in jail, this did render his testimony incompetent. *People v. Schuyler.* 293

4. On cross-examination the witness stated he thought it was a practical impossibility to eliminate from his own mind the convictions formed as the physician of the prisoner and thus answer the question. On being reminded that he had answered, he stated that he withdrew the answer and did not wish it to be treated as an answer. The district attorney objected; the court held it had not the power to strike out the answer and refused so to do. *Held* (RAPALLO and ANDREWS, J.J., dissenting) that as the witness was not bound to eliminate the knowledge he acquired as jail physician, if he could not, it did not render the answer incompetent; and so it was not error to refuse to strike it out. *Id.*

5. After the statements of the witness as to his knowledge of the prisoner and before the hypothetical question was put, the court stated that the witness could not give any testimony based upon any fact that he learned either from or in regard to defendant at any time when the relation of patient and physician existed. *Held*, that the erroneous assumption by the court that the mere fact that the witness was the jail physician created the relation of patient and physician between him and defendant, did not render the question incompetent; that an erroneous ruling in defendant's favor could not render incompetent evidence which, in its nature, was competent. *Id.*

6. As to whether the said provision renders a physician incompetent to testify that his patient was free from disease of any kind, *quære.* *Id.*

7. Also, *quære*, as to whether, when the patient calls witnesses to testify as to his mental condition, he does not waive his privilege under

- the provision and throw open the inquiry. *Id.*
8. Defendant's wife was called as a witness in his behalf, and testified, among other things, that the night before the commission of the crime defendant came home at nine o'clock sick at his stomach and with a severe headache; that he went to bed and she put a board at his feet so that by pressing against it he could press his head against the head-board, and that he lay there for hours. On cross-examination her attention was called to an occasion, the day after the homicide, when the district attorney and certain other persons specified were present, and she was asked if she did not say to the district attorney on that occasion that she had never seen anything strange or unusual in the conduct of her husband. Also, if she did not say "that he went to bed as usual the night before," or "that he went to bed and slept as usual." She denied having said anything of the kind. Subsequently one of the persons named was called as a witness by the prosecution, and his attention having been called by the district attorney to the occasion referred to, he was asked: "Did she then say to us that Mr. Schuyler went to bed about nine P. M. the preceding evening in his usually healthy condition and slept all night as far as she knew?" This was objected to, the objection overruled and witness answered, "she did." *Held*, that the evidence was properly received to contradict and discredit the defendant's witness; and that the evidence went no further than her examination fairly justified. *Id.*
9. Under the act of 1885 (Chap. 183, Laws of 1885, as amended by chap. 458 of that year), prohibiting the sale of adulterated milk, and making the violation of the prohibition a misdemeanor, criminal knowledge or intent forms no element of the offense. *People v. Kibler*. 321
10. All that is requisite to establish the offense is to show a sale of milk falling below the standard fixed by the act and coming within its definition of adulterated milk. *Id.*
11. If the sale was of skimmed milk, and if such sale is within the exception of the statute (as to which *quære*), this is matter of defense. *Id.*
12. Upon the trial of an indictment for forgery in signing fictitious names, as maker and indorser of a note, and procuring the discount of the same as a genuine note, H., a witness for the prosecution, after he had testified that he indorsed the note, in reliance upon representations on the part of the defendant that the maker and indorser were responsible farmers living in a locality specified by defendant, was permitted to testify to what he did in searching for the maker and indorser, and the result thereof; also that he examined the assessment-roll of the town and found no such names thereon. *Held*, no error. *People v. Jones*. 523
13. The court, in passing upon the question as to the admissibility of such testimony, stated that any conversation between the witness and any person he talked to while engaged in the search would not be allowed. *Held*, the fact that the witness in answering did state, in some cases, the responses made to his inquiries, was not a ground for an exception, as the testimony was not called for; that if defendant's counsel desired to have it stricken from the record he should have made a motion. *Id.*
14. Upon cross-examination of the cashier of the bank where defendant had the note discounted, questions were asked as to the dealings between defendant and H., and as to how many notes indorsed by H. for defendant had been paid by him or by H. Thereafter H. was asked, as a witness for the prosecution, how much money he had had to pay for defendant. The court overruled an objection thereto on the ground that defendant's counsel had gone into the subject on the cross-examination of the cashier. *Held*, no error. *Id.*

COVENANTS.

Plaintiff was lessee of certain premises, upon which was a hotel, formerly separated from defendant's premises by a strip of land thirty feet wide. This strip, in the deed under which defendant claimed, which was from W., the then owner of the whole property, was described as thereby dedicated for the purposes of a public street; the dedication was never accepted by the public. The deed from W. stated that the conveyance was for the purpose of a railroad depot only, and the grantee erected a depot upon the premises. W., devised the remaining property, one-fourth to each of four devisees. On partition of the hotel property, not including the strip of thirty feet, two of the devisees became the owners. They subsequently quit-claimed to defendant's predecessor an undivided one-half of that portion of the strip in question, twenty feet wide, adjoining the land so conveyed by W. The deeds contained a provision to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed. The hotel was accessible from the depot across said strip, and depended largely for its patronage upon the passengers arriving at and departing from the depot. Defendant, on succeeding to the title of W.'s grantee, built a high and substantial fence the whole length of the strip, on the line between the twenty feet so conveyed and the remaining ten feet, with no opening therein, thus cutting off all passage between the hotel and depot. In an action, among other things, to restrain the continuance of the fence, *held*, that by the failure to accept the dedication, the thirty feet strip remained the property of W., and descended to his devisees at his death; that plaintiff, as lessee of the grantors, could not question the validity of

the quit-claim deeds which must be regarded as conveying all the interest of the grantors in the twenty feet, and they thereby abandoned all claim to the same as a public highway; but that the provision in the deeds as to an opening was a covenant running with the land conveyed; that such covenant made the right of passage across the twenty feet a right or easement appurtenant to the hotel property, and so it was enforceable by plaintiff as lessee of such property; and that, therefore, the action was maintainable. *Acery v. N. Y. C. & H. R. R. R. Co.* 143

DAMAGES.

A policy of insurance, executed by defendant to plaintiff, recited that E. & Co., "by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month." It was covenanted in and by the policy that, in case the premises occupied by E. & Co. should be damaged by fire, "so as to cause a diminution of said royalties," defendant would pay "the amount of such diminution, during the restoration of said premises to their producing capacity, immediately preceding said fire." In an action on the policy, *held*, that the recovery could not be limited to loss of royalties on the oil actually burned, as the principal loss arose from the enforced idleness of the works; and that it was competent on the question of damages to prove the royalties paid for two months immediately preceding the fire, and those paid during the restoration of the works, and for some months thereafter. *Nat. F. Oil Co. v. Citizens' Ins. Co.* 535

— Measure of, in action for breach of covenant against purchaser of a portion of mortgaged premises who assumed payment of whole mortgage.

See Wilcox v. Campbell.

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DEBTOR AND CREDITOR.

1. The unissued shares of stock of a corporation are not assets in its hands, and in the absence of any statutory provision, or provision of its charter, one to whom shares have been transferred by it gratuitously, does not, by accepting them, become a debtor to the company or make himself liable to pay the nominal face of the shares as upon a subscription for the stock or a contract, and an action is not maintainable against him by a creditor of the corporation to compel him to pay for such shares. *Christensen v. Eno.* 97
2. Where bonds of a corporation have been issued by it gratuitously to a stockholder, but no portion of its property or assets has been applied in payment thereof, the stockholder is not liable to account to creditors for the proceeds of the sale of said bonds by him. *Id.*
3. No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other; and no obligation can be implied in law from a voluntary payment of the debt of another, without his request, by one who is under no legal liability or compulsion to make it. *First Nat. Bk. v. Bd. Suprs.* 488
4. The general creditors of a mortgagor of chattels have no right to assail the mortgage as invalid until they have secured a lien thereon by a levy under judgment and execution, or in some way have acquired a legal or equitable interest therein. *Sullivan v. Miller.* 635

DEED

1. Plaintiff was lessee of certain premises, upon which was a hotel, formerly separated from defendant's premises by a strip of land thirty feet wide. This strip, in the deed under which defendant claimed, which was from W., the then owner of the whole property, was described as thereby dedicated for the purposes of a public street;

the dedication was never accepted by the public. The deed from W. stated that the conveyance was for the purpose of a railroad depot only, and the grantee erected a depot upon the premises. W. devised the remaining property, one-fourth to each of four devisees. On partition of the hotel property, not including the strip of thirty feet, two of the devisees became the owners. They subsequently quit-claimed to defendant's predecessor an undivided one-half of that portion of the strip in question, twenty feet wide, adjoining the land so conveyed by W. The deeds contained a provision to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed. The hotel was accessible from the depot across said strip, and depended largely for its patronage upon the passengers arriving at and departing from the depot. Defendant, on succeeding to the title of W.'s grantee, built a high and substantial fence the whole length of the strip, on the line between the twenty feet so conveyed and the remaining ten feet, with no opening therein, thus cutting off all passage between the hotel and depot. In an action, among other things, to restrain the continuance of the fence, *held*, that by the failure to accept the dedication, the thirty feet strip remained the property of W. and descended to his devisees at his death; that plaintiff, as lessee of the grantors, could not question the validity of the quit-claim deeds which must be regarded as conveying all the interest of the grantors in the twenty feet, and they thereby abandoned all claim to the same as a public highway; but that the provision in the deeds as to an opening was a covenant running with the land conveyed; that such covenant made the right of passage across the twenty feet a right or easement appurtenant

to the hotel property, and so it was enforceable by plaintiff as lessee of such property; and that, therefore, the action was maintainable. *Avery v. N. Y. C. & H. R. R. Co.* 142

2. Plaintiff being the owner of two lots, Nos. 141 and 143, each twenty-two feet wide, on a street in the city of New York, sold and conveyed to defendants' grantor lot 143 by metes and bounds "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging." Lot 141 adjoined lot 143 on the east. On the rear of lot 143, at the time of the conveyance, was a house, the front and rear walls of which extended five feet over on lot 141 to the western wall of a building on that lot; they were not keyed into such western wall and the timbers of the house were not supported thereby, but rested on piers; the eastern rooms of the house had this wall for their eastern boundary and the plastering was placed upon or directly against it. In an action of ejectment to recover possession of the five feet so occupied, *held*, that the deed did not convey the land in dispute, but only so much of the building as was on the lot described; nor did it give the grantee, as an easement appurtenant to the grant, a right to retain possession thereof and to use the said exterior wall so long as it endured as a wall to his house; and that, therefore, plaintiff was entitled to recover. *Griffiths v. Morrison.* 165

3. There were also a privy, hydrant, etc., on lot 141, connected with the said house on lot 143. *Held*, that the grantee acquired no easement for the maintenance thereof. *Id.*

4. By the word "appurtenances" incorporeal easements or rights or privileges will alone pass; and of these only such as are necessary to the proper enjoyment of the estate granted. *Id.*

5. Where a conveyance of land to a religious corporation is absolute,

without condition or reservation, it creates no trust beyond the duty imposed by law upon the corporation of using its property for the purposes contemplated in its creation. Such a trust is not fastened upon the land, but the corporation may, with the judicial consent, sell and convey a good title, the proceeds in such case taking the place of the land. *In re First Presb. Soc.* 251

6. Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor; the possibility of reverter merely is not an estate in land. *Vail v. L. I. R. R. Co.* 263

7. A deed conveyed, for a valuable consideration expressed, a certain strip of land described therein to a town and its "assignees forever," with covenants of warranty. Following the description was the following: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." *Held*, that the deed conveyed the fee of the land, not an easement merely; that the clause restricting the use operated at most as a condition subsequent, and until the contingency happened the whole title was in the grantee. *Id.*

8. A deed described the premises conveyed as "known by being lot No. 8 * * * lying southerly or south-easterly of Fish Lake * * * commonly called the Fish Lake lot, supposed to contain sixty-seven acres of land." Lot 8 contains about six hundred acres, all of which, except about sixty-seven acres lying south of the lake and about seven acres north of it, are covered by the lake. In an action of trespass, wherein the *locus in quo* was the seven acres, to which defendant claimed title under the deed, *held*, that the deed did not cover the seven acres; that the reference to the land intended to be conveyed

as "lot 3" was a mistake or false.
Case v. Dexter. 548

DEFINITIONS.

1. A ferry is the continuation of a highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers with their teams and vehicles and such other property as they carry or have with them. *Mayor, etc., v. Starin.* 1
2. By the word "appurtenances" incorporeal easements or rights or privileges will alone pass; and of these only such as are necessary to the proper enjoyment of the estate granted. *Griffiths v. Morrison.* 165
3. The word "sold" in a contract of sale of chattels does not necessarily import an executed contract. *Anderson v. Read.* 383
4. Where, by the terms of the contract, some material act remains to be done by the vendor before he can insist upon making delivery or can claim payment, such word is to be construed as meaning "contracted to sell," and the contract is merely an executory one. *Id.*

DISCHARGE.

1. In 1875 the firm of G. T. & Co., composed of the defendants, executed to plaintiff its promissory note upon which this action was brought, and judgment was recovered in January, 1883, against all of the defendants. In August, 1878, defendant G., then being a resident of Massachusetts, filed his petition in bankruptcy, and in March, 1883, obtained his discharge from all debts and claims provable against his estate which existed on August 3, 1878, save as excepted by the bankrupt act. Before the petition in bankruptcy was filed the firm was dissolved, an assignment of its property made and the assets distributed among creditors. An application made

by G. in September, 1886, for a discharge of said judgment of record as against G. was granted. *Held*, that the discharge in bankruptcy covered the judgment; that conceding G. could have obtained from the United States Court a stay of proceedings in this action, he was not bound so to do, and his omission could not deprive him of the benefit of the provision of the Code of Civil Procedure (§ 1208), providing that at any time after the lapse of two years from a bankrupt's discharge he may apply to the court in which a judgment was rendered against him to have it discharged of record, and requiring the court to grant the application "if it appears that he has been discharged from the payment of that judgment;" also, that if the doctrine of *laches* applied, it was for the court below to deal with it, and its decision was not reviewable here. *West Phila. Bk. v. Gerry.* 487

2. Under the late bankrupt act, in proceedings instituted for his discharge by one member of a firm, upon his individual petition, partnership debts were provable, and he was entitled to be discharged from them, whether there were any assets of the firm or not. *Id.*
3. It was objected that the judgment was not included in G.'s schedule in bankruptcy; it appeared that the note upon which the judgment was recovered was set forth. *Held*, that a discharge of the cause of action discharged the judgment. *Id.*
4. This action was for the conversion of a promissory note; the answer alleged a former suit pending. It appeared that in March, 1882, plaintiff commenced an action on contract against defendant to recover the proceeds of said note, and of another, both of which were delivered to defendant to sell and were unaccounted for by him, which action was instituted in reliance upon defendant's representation that the notes had been sold. Judgment was entered in that action by default in April, 1882, for the amount of

both notes, and on examination of defendant in supplementary proceedings thereon, in May, 1882, it appeared that he had the note in suit here in his possession when the former action was commenced. Said judgment was vacated on plaintiff's motion, and an order procured for a commission and a reference to examine defendant, after which, in October, 1882, this action was brought. In May, 1888, after notice of trial had been served and eight days before trial, the complaint in the first action was amended so as to limit it to the other note. When the motion to vacate the judgment in the first action was made defendant was imprisoned by virtue of an order of arrest issued therein. No execution against his person had been issued. As a condition of granting the motion the court required plaintiff to stipulate that defendant should be permitted to make application for his discharge at the time he would have been entitled to make it if the judgment had not been vacated and if execution had been issued thereon. The stipulation was made as required. *Held*, that this did not convert the order of arrest into a body execution and did not operate to discharge and satisfy the cause of action. *Bouker F. Co. v. Cox.* 555

EASEMENT.

1. Plaintiff being the owner of two lots, Nos. 141 and 143, each twenty-two feet wide, on a street in the city of New York, sold and conveyed to defendants' grantor lot 143 by metes and bounds "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging." Lot 141 adjoined lot 143 on the east. On the rear of lot 143, at the time of the conveyance, was a house, the front and rear walls of which extended five feet over on lot 141 to the western wall of a building on that lot; they were not keyed into such western wall and the timbers

of the house were not supported thereby, but rested on piers, the eastern rooms of the house had this wall for their eastern boundary and the plastering was placed upon or directly against it. In an action of ejectment to recover possession of the five feet so occupied, *held*, that the deed did not convey the land in dispute, but only so much of the building as was on the lot described, nor did it give the grantee, as an easement appurtenant to the grant, a right to retain possession thereof and to use the said exterior wall so long as it endured as a wall to his house; and that, therefore, plaintiff was entitled to recover. *Griffiths v. Morrison.* 165

2. There were also a privy, hydrant, etc., on lot 141, connected with the said house on lot 143. *Held*, that the grantee acquired no easement for the maintenance thereof. *Id.*

EJECTMENT.

1. E., a married woman, died seized of a lot of land, the south-west line of which, as described in the deed under which she held was near to high-water mark of the St. Lawrence river. The deed contained a reservation (so-called therein) of all the grantor's rights "to the land now under water and to the water front beyond or south-west" of the south-west line of the lot conveyed. E died intestate, leaving her husband and two infant children her surviving. In an action of ejectment, brought by the survivors, to recover the premises embraced in the reservation, the answer of the infants denied any entry by them upon or claim of title to any land except that of which their mother was seized at the time of her death, and no evidence was given tending to show possession of or assertion of title on their part to the premises in question; nor did it appear that their mother ever entered upon or claimed any right or interest in said premises. It did appear that after the death of

E., her husband entered upon the said premises, erected structures thereon and tore down a wharf erected by plaintiffs. *Held*, that the infant defendants were improperly made parties; that their joinder as such was not justified by the Code of Civil Procedure (§ 1508), and the complaint should have been dismissed as to them; that they were not bound by the acts of their father, as these acts must be referred to his own interest and title as life tenant, not to the title of the remaindermen. *Sisson v. Cummings*. 56

2. In an action of ejectment defendants claimed title under a conveyance in proceedings under the Revised Statutes providing for the sale of real estate belonging to infants. (3 R. S. 194, § 167 *et seq.*) The only proof of compliance with the statute was of the presentation of a petition to the county judge for a sale and appointment of a special guardian, the appointment, the execution by the guardian of a bond and the approval thereof. No reference to a master or referee to inquire into the merits of the application as required (§ 175) was proved, or that the court was informed of the situation and value of the land, the reason for its sale, the name of the intended purchaser, the price to be paid or the manner of payment; nor was it shown that a sale was ordered or the contract of sale confirmed (§§ 177, 178). *Held*, that a valid sale was not established and the purchaser acquired no title under the conveyance. *Elwood v. Northrup*. 172

3. Defendant also claimed, by adverse possession for more than twenty years, under a claim of title founded on a deed from W., executed in 1856. The premises were originally part of a farm purchased by L., but conveyed to W. in trust for the "sole, use, benefit and behoof" of L. The latter died in 1846, leaving a will executed in 1889, by which he devised a portion of the farm to his daughter P. for life, remainder to her male heirs. By the will pro-

vision was made for payment of a mortgage on the farm by applying thereon moneys due the testator upon a larger mortgage held by him. W. was one of the executors of said will. A division of the farm was made, with the assent of W., among the devisees, and the premises in question were set off to P., who took possession and was in possession at the time of the execution of the deed by W. P. died in 1870. W. was held by the trial court to have been, at the time of the execution of his deed, a mortgagee in possession, upon evidence to the effect that there was found among his papers, after his death, the mortgage upon the farm, with an indorsement thereon signed by B., the then holder dated in 1848, acknowledging the receipt of one dollar in full discharge thereof, also an assignment of the mortgage from B. to W., dated in 1842, but acknowledged on the same day the discharge was executed. It did not appear that W. ever entered into possession of the property, or claimed to hold it by virtue of the mortgage or by any other right or tenure. The mortgage referred to in the will as the source of payment of B.'s mortgage, was satisfied of record on the day after the date of the discharge. W. settled his accounts as executor without any claim of any indebtedness to him on account of payment of the mortgage. *Held*, that the decision of the trial court was error; that the grantee of W. took no interest under his deed, because it was void under the statute by reason of the adverse possession of P. at the time of its execution, and because at that time W. had no possession of the premises or mortgage thereon. *Id.*

ELECTION OF REMEDIES.

1. Where there is a warranty of quality on sale of goods, the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the con-

tract as a defense to an action for their price. *Norton v. Dreyfuss*. 90

2. *It seems*, however, the purchaser may not, in the same action, sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty. *Id.*

3. This action was for the conversion of a promissory note; the answer alleged a former suit pending. It appeared that in March, 1882, plaintiff commenced an action on contract against defendant to recover the proceeds of said note, and of another, both of which were delivered to defendant to sell, and were unaccounted for by him, which action was instituted in reliance upon defendant's representation that the notes had been sold. Judgment was entered in that action by default in April, 1882, for the amount of both notes, and on examination of defendant in supplementary proceedings thereon, in May, 1882, it appeared that he had the note in suit here in his possession when the former action was commenced. Said judgment was vacated on plaintiff's motion, and an order procured for a commission and a reference to examine defendant, after which, in October, 1882, this action was brought. In May, 1883, after notice of trial had been served, and eight days before trial, the complaint in the first action was amended so as to limit it to the other note. *Held*, that after discovery of the falsehood of defendant, plaintiff was bound promptly to elect between the then existing action and a remedy by action *ex delicto*, that the election came too late, and the plea was good. *Bowker F. Co. v. Cor.* 555

ESTOPPEL.

1. An indorser of a promissory note is not estopped from setting up usury as a defense thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full

consideration and subject to no defense of usury or otherwise, where it appears that when the note was transferred to the holder, he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred. *Lewis v. Barton*. 70

2. A married woman may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui jure*. *Noel v. Kinney*, 74

3. Where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact to the prejudice of a third person who has dealt with the agent in good faith in reliance upon the representation. *Bk. Batavia v. N. Y., L. E. and W. R. R. Co.* 195

4. This rule applies as well where a corporation as where an individual is the principal. *Id.*

— *When vendor of chattels not estopped from showing, as against assignee of vendee, that no title passed.*
See Anderson v. Read. 333

— *When receiver of insolvent insurance company, not estopped by judgment against it.*
See People v. K. L. Ins. Co. 619

EVIDENCE.

1. In an action to recover damages for an alleged interference with plaintiff's rights in a street, by the construction upon the street and operation of an elevated railroad. *Held*, that evidence was competent, that since the building of the railroad the trade and business of the street had fallen off and the amount of custom greatly diminished in volume and changed in character; that to measure and

appreciate the individual loss to plaintiff the nature and extent of the general injury were properly and necessarily considered.
Drucker v. Manhattan R. Co. 157

2. Also, *held*, it was proper to prove and to take into consideration as elements of damages the impairment of plaintiff's easement of air, caused by smoke, gases, ashes and cinders from passing trains, the lessening of the easement of light, caused by the elevated road itself and the passage of trains, and the interference with convenience of access, caused by the drippings of oil and water. *Id.*
3. Upon the trial of an indictment for murder, where the defense was insanity, the prosecution called as a witness, B., who was a physician of the jail where defendant was confined for six months prior to the trial. B. testified that he was employed by the board of supervisors, and as such had medical charge of all prisoners in the jail; that he examined defendant at the request of both parties and "kept an eye on the case;" that he saw to the defendant, as he did to others, when he needed it. There was no proof that defendant was at any time sick during the six months, or that the witness was ever called to attend upon or prescribe for him as a physician. A hypothetical question was then put to the witness, from which was excluded all personal knowledge he had of the defendant, but which was based entirely on facts which occurred before defendant came to the jail, and the witness was requested to answer, without any reference to anything, except to the facts stated as to whether the defendant was sane or insane when he committed the act. The witness stated that it was very questionable whether in answering he could, and he was unwilling to say that he could exclude the knowledge he had obtained while defendant was in jail. The question was objected to as incompetent under said provision and the witness allowed to answer. He answered "sane." *Held* (RAPALLO and ANDREWS, JJ., dissenting), that the evidence was competent; that even if the witness was influenced by the knowledge he acquired by seeing the defendant in jail, this did render his testimony incompetent. *People v. Schuyler.* 296
4. On cross-examination the witness stated he thought it was a practical impossibility to eliminate from his own mind the convictions formed as the physician of the prisoner and thus answer the question. On being reminded that he had answered, he stated that he withdrew the answer and did not wish it to be treated as an answer. The district attorney objected; the court held it had not the power to strike out the answer and refused so to do. *Held* (RAPALLO and ANDREWS, JJ., dissenting), that as the witness was not bound to eliminate the knowledge he acquired as jail physician, if he could not, it did not render the answer incompetent; and so it was not error to refuse to strike it out. *Id.*
5. After the statements of the witness as to his knowledge of the prisoner and before the hypothetical question was put, the court stated that the witness could not give any testimony based upon any fact that he learned either from or in regard to defendant at any time when the relation of patient and physician existed. *Held*, that the erroneous assumption by the court that the mere fact that the witness was the jail physician created the relation of patient and physician between him and defendant, did not render the question incompetent; that an erroneous ruling in defendant's favor could not render incompetent evidence which, in its nature, was competent. *Id.*
6. As to whether the said provision renders a physician incompetent to testify that his patient was free from disease of any kind, *quære* *Id.*
7. Also, *quære*, as to whether, when the patient calls witnesses to tes-

tify as to his mental condition, he does not waive his privilege under the provision and throw open the inquiry. *Id.*

8. Defendant's wife was called as a witness in his behalf, and testified, among other things, that the night before the commission of the crime defendant came home at nine o'clock sick at his stomach and with a severe headache; that he went to bed and she put a board at his feet so that by pressing against it he could press his head against the headboard, and that he lay there for hours. On cross-examination her attention was called to an occasion, the day after the homicide, when the district attorney and certain other persons specified were present, and she was asked if she did not say to the district attorney on that occasion that she had never seen anything strange or unusual in the conduct of her husband. Also, if she did not say "that he went to bed as usual the night before," or "that he went to bed and slept as usual." She denied having said anything of the kind. Subsequently one of the persons named was called as a witness by the prosecution, and his attention having been called by the district attorney to the occasion referred to, he was asked: "Did she then say to us that Mr. Schuyler went to bed about nine P. M. the preceding evening in his usual healthy condition and slept all night as far as she knew?" This was objected to, the objection overruled and witness answered, "she did." *Held*, that the evidence was properly received to contradict and discredit the defendant's witness; and that the evidence went no further than her examination fairly justified. *Id.*

9. Upon the trial of an indictment for forgery in signing fictitious names, as maker and indorser of a note, and procuring the discount of the same as a genuine note, H., a witness for the prosecution, after he had testified that he indorsed the note, in reliance upon representations on the part of the defendant that the maker and in-

dorser were responsible farmers living in a locality specified by defendant, was permitted to testify to what he did in searching for the maker and indorser, and the result thereof; also, that he examined the assessment-roll of the town and found no such names thereon. *Held*, no error. *People v. Jones.* 523

10. Upon cross-examination of the cashier of the bank where defendant had the note discounted, questions were asked as to the dealings between defendant and H., and as to how many notes indorsed by H. for defendant had been paid by him or by H. Thereafter H. was asked, as a witness for the prosecution, how much money he had had to pay for defendant. The court overruled an objection thereto on the ground that defendant's counsel had gone into the subject on the cross-examination of the cashier. *Held*, no error. *Id.*

11. Where a charter-party is not under seal it is competent to prove, by evidence *aliunde*, that the charterers named therein, and who executed it, did so not only for themselves but also for others who were jointly interested with them as principals, and an action is maintainable thereon against all the parties so interested. *Woodhouse v. Duncan.* 527

12. A policy of insurance, executed by defendant to plaintiff, recited that E. & Co., "by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month." It was covenanted in and by the policy that, in case the premises occupied by E. & Co. should be damaged by fire, "so as to cause a diminution of said royalties," defendant would pay "the amount of such diminution, during the restoration of said premises to their producing capacity immediately preceding said fire." In an action upon the policy, *held*, that it was competent to give in evidence the contract

between plaintiff and E. & Co.
N. F. Oil Co. v. Citizens' Ins. Co.
535

12. A deed described the premises conveyed as "known by being lot No. 3 * * * lying southerly or south-easterly of Fish Lake * * * commonly called the Fish Lake lot, supposed to contain sixty-seven acres of land." Lot 3 contains about six hundred acres, all of which, except about sixty seven acres lying south of the lake and about seven acres north of it, are covered by the lake. In an action of trespass, wherein the *locus in quo* was the seven acres, defendant claimed title under the deed. Plaintiff offered to prove that the land south of the lake was known by common repute as the "Fish Lake lot." This was objected to and rejected. *Held*, that if there was any doubt on the proof, as it stood, as to the intention of the parties the rejection of this evidence was error. *Case v. Dexter.* 548

14. In an action against a Connecticut railroad corporation for negligence, plaintiff was permitted, on the trial, against defendant's exception, to read in evidence portions of the statutes of that State relating to the running of railroad trains, and the court refused to charge the jury that they were not to be influenced by said provisions. *Held*, no error. *Archer v. N. Y., N. H. & H. R. R. Co.* 589

15. Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident, and testified that it represented fairly the locality. On cross-examination he testified that he did not take it and did not know from what point it was taken. The reception of the photograph was objected to generally and objection overruled. *Held*, no error; that the photograph, if a fair representation, was admissible the same as a map or other diagram. *Id.*

EXECUTOR AND ADMINISTRATOR.

1. An action by an executor upon a claim, alleged to be due the estate, arising out of transactions between the testator and another, must be brought by the executor as such; it is not maintainable by him in his individual capacity. *Hone v. De Peyster.* 645
2. In such an action the executor, unless mismanagement or bad faith is shown, is not chargeable individually with costs. (Code of Civil Pro. § 246.) *Id.*
3. The rule is not changed by the fact that the executor is beneficially interested in the estate as residuary legatee. *Id.*
4. It is the duty of the court, in an action brought by an executor as such, to determine the question as to his individual liability for costs, in case he is defeated; and where he is by the judgment charged with costs in a representative capacity alone, this impliedly determines that he is not liable individually; the decision is final and conclusive unless it is subsequently reversed or set aside by a direct proceeding for that purpose. *Id.*
5. He may not, therefore, be charged with such costs in a collateral proceeding. *Id.*
6. A bond of indemnity given by an administrator to the sureties on his bond was conditioned to save the obligees "from any loss or error which might arise from or be caused by said administration." The administrator settled his accounts and was discharged. *Held*, that the bond did not cover expenses incurred by the obligees in an effort to be discharged as sureties, or in an effort, on their part to compel the administrator to account. *Boyle v. Boyle.* 654

FACTOR.

1. Where a commercial correspondent advances his own money or

credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid. *Moors v. Kudder.* 52

2. The factors' act (Chap. 179, Laws of 1830), was designed to protect persons dealing in good faith with the apparent owner of property; it does not apply where protection would secure to a wrongdoer the fruits of a fraud. *Dorance v. Dean.* 203

8. In an action for the conversion of a quantity of corn it appeared that plaintiff, who was the owner, consigned the corn to L. & Co., commission merchants, for sale. The latter delivered it to defendants, who advanced money on account of it. The court after charging that defendants could keep the corn as security for the money advanced, provided they did not at the time know that plaintiff was the owner, charged that if, on the other hand, they knew that L. & Co. were using plaintiff's property to raise money for themselves, they could not hold it, but stood in L. & Co.'s place. *Held.* no error. *Id.*

FEEES.

1. Where an attorney is employed, without agreement as to compensation, to bring a great number of actions, alike in their nature, involving no complicated questions of law and only the most simple questions of fact; which actions are disposed of by obtaining judgments by default or otherwise without contests, there is no rule of law which makes, as against his client, the taxable costs the measure of compensation to which he is entitled for his services. He is simply entitled to what it can

be shown the services are reasonably worth under the circumstances. *Starin v. Mayor, etc.* 82

2. *It seems* that since the passage of the Code, there is no rule of law which in any case makes the compensation of the attorney necessarily co-extensive with the taxable costs, in the absence of an agreement. *Id.*

FERRIES.

1. Any person who invades the rights of the owner of a ferry franchise by running a ferry himself, is liable for any damages he thus causes the owner and may be restrained by the court. *Mayor, etc. v. Starin.* 1

2. *It seems*, however, the courts will not restrain the operation of a ferry which is demanded by the public convenience simply because the franchise belongs to another, who neglects or refuses to use it. *Id.*

3. A ferry is the continuation of a highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers with their teams and vehicles and such other property as they carry or have with them. *Id.*

4. A ferry franchise does not include the carrying of freight and merchandise without the presence of the owners; this is the business of a common carrier and may be done without interference with such franchise. *Id.*

5. A ferry franchise is property, and the sovereign power may make an irrevocable perpetual grant of it, the same as of any other property. *Id.*

6. By the Montgomerie charter the city of New York received, not simply the political right to establish and regulate ferries, but the property in the ferry franchises from the "Island Manhattan's to any of the opposite shores all

around the same island." The words "opposite shores" were not intended to limit the right granted to ferries from some point in the city to a point diametrically opposite, but the purpose was to secure to the city all the ferry franchises to and from it. *Id.*

7. Accordingly *held*, that the grant included the ferry franchises and the exclusive right to control and receive the revenues of all ferries between the city and Staten Island. *Id.*

8. The rule requiring all gratuitous grants by the sovereigns of exclusive privileges and franchises to be construed strictly, and that any ambiguity therein must operate against the grantee, is not in its strictness fully applicable to the grant of a ferry franchise. Such a grant is never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry, with suitable accommodations, for the convenience of the public. *Id.*

9. The rule also does not apply to the grants under said charter, as by the terms of the charter itself it is in all things to "be construed * * * benignly and in favor of and for the most and greatest advantage, profit and benefit" of the city. *Id.*

10. The omission of the city to assert its rights under the charter, or passive submission to the invasion thereof, *held* to have but little bearing in the construction of the grant; but that the acts of the city in asserting and exercising its rights from time to time, claiming the exclusive franchise, conclusively showed its understanding of its rights under the charter. *Id.*

11. *It seems* that the various statutes creating corporations to operate ferries between the city and Staten Island (Chap. 192, Laws of 1839; chap. 863, Laws of 1845; chap. 257, Laws of 1818), give no right to the corporations so organized to interfere with the franchises of

the city, and before they could lawfully operate their ferries they were bound to acquire the right from the city. *Id.*

12. Also, *held*, that where lessees from the city were engaged in operating ferries between the city and Staten Island, it was no defense in an action against one operating such a ferry in violation of the rights of the city, that it had not lawfully established a ferry to said island or executed a legal lease; that a mere wrongdoer was not in a position to assail the action of the city, and could not appropriate its franchises because it had not in the management of them observed the provisions of its charter; and that it was sufficient to authorize a judgment restraining such an invasion of its rights for the city to show that ferries, adequate for the public convenience, were in fact established and operated; and so that its duties to the public as owner of the franchises had been discharged. *Id.*

13. Also, *held*, the fact that the defendant in such an action had a coasting license did not give it authority to invade the ferry franchises of the city. *Id.*

14. Also, *held*, that persons who had merely chartered steamboats to the company operating the unlawful ferry, to be used in the business, did not violate the rights of the city and were not proper parties to the action. *Id.*

15. Also, *held*, that others who were mere servants or agents of said company, while they might in the discretion of the court be joined as defendants, were not necessary parties, and that this court could not review a dismissal of the complaint as to them. *Id.*

16. A ferry may be established and operated over intervening waters where they are not so wide but that they can be traversed at regular and brief intervals by boats adapted to a ferry business. *Mayor, etc., v. N. J. Stmbl. Nar. Co.* 28

17. There is nothing in the nature of a ferry business which requires that a ferry shall be operated from but one place on one shore to a single place upon the opposite shore. *Id.*

18. Under the grant to the city of New York of ferry franchises by the Montgomerie charter, the city has authority to establish a ferry to run from one place in the city to several places on Staten Island. *Id.*

19. The city, however, in the discharge of its duty as the owner of said franchises, is not bound to have more than one terminus for its Staten Island ferries in this city, unless it is made to appear that more than one is needed for the accommodation of the public. *Id.*

20. In an action to restrain defendant, the N. J. S. T. Co., from infringing upon the ferry franchises belonging to the said city between it and Staten Island, it appeared that defendant was engaged in carrying passengers to and from the city, its boats stopping in going and returning at several places on Staten Island and at two places in New Jersey, the round trip being about twenty-four miles. *Held*, that the business of defendant did not lose its character as a ferry business because its boats stopped on the New Jersey shore; that while in the carriage of passengers from one place on the New Jersey shore or the Staten Island shore to another on the same shore, it was simply doing the business of a common carrier, as its boats did not pass over intervening waters; it was engaged in a ferry business between every point at which its boats touched for passengers and the city; that so far as it was thus operating a ferry between the city and Staten Island it was unlawfully infringing upon the ferry franchises of the city; and that a judgment restraining such unlawful acts was proper. *Id.*

21. Also, *held*, the fact that the terminus of defendant's ferry in

the city was at a private pier, seven-eighths of a mile distant from the ferry terminus established by the city, did not affect the character of defendant's acts as an unlawful intrusion upon the rights of the city. *Id.*

FIRE DEPARTMENT.

1. Under the provision of the charter of the city of Brooklyn of 1873 (§§ 9, 14, tit. 18, chap. 863, Laws of 1873), as amended by the act of 1874 (§ 20, chap. 589, Laws of 1874), specifying the causes for which members of the Department of Fire and Buildings in the city of Brooklyn may be dismissed, before there can be any conviction and removal, the member proceeded against is entitled to notice of the charge against him, a hearing and trial. *People ex rel. v. Com'rs Dept. F and B'ldgs.* 64

2. Where, therefore, it appeared by the affidavit, writ and return herein, that the relator was, without trial or hearing, dismissed by the commissioners of said department from the position of detailed fireman and member of the department. *Held*, that the proceedings of the commissioners were erroneous and void. *Id.*

3. The provision of general orders No. 13 of the Board of Commissioners of the Fire department of the city of New York, series of 1891 (par. 5, § 3), which provides that every officer and member of the uniformed force of the department shall "be responsible for any want of judgment, skill * * * which may cause unnecessary loss of life, limb or property," refers to a loss which has actually resulted, not to one which might have happened. *People ex rel. v. Bd. Fire Com'rs.* 257

4. Where, therefore, no actual loss has been occasioned by an act of a member of the force complained of, he cannot be held responsible under said provision. *Id.*

5. The jurisdiction of the fire de-

partment of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, includes structures on the wharves and piers owned by the city as well as those owned by private individuals. (PECKHAM, J., dissenting.) *Fire Dept. v. Atlas S. S. Co.* 566

6. The history of legislation in relation to buildings and the prevention of fires in said city, given. *Id.*
7. Whether the fire department acts independently as a distinct entity, with corporate powers, or as an agency of the city, it is not estopped from claiming against a lessee of one of the city wharves obedience to the building laws, and all orders and regulations lawfully made, in pursuance thereof, by the fact that the lease contains provisions in contravention of those laws and orders. *Id.*
- 8 Accordingly held, in an action against a lessee of a pier belonging to the city, to recover the penalty imposed by the act of 1871 (§ 32, chap. 625, Laws of 1871), because of a violation of the requirements of a permit granted by the board of examiners for the erection of a structure on said pier, that plaintiff was not estopped by a provision in the lease authorizing the structure to be erected in a manner different from said requirements. *Id.*

FORECLOSURE.

1. The real owner of mortgaged premises does not forfeit his right to be made a party to an action to foreclose the mortgage by an omission to record his deed; and, provided he make application in due time, it is the duty of the court to direct him to be brought in. (Code of Civil Pro. § 452.) *Johnson v. Donovan.* 209
2. In an action to foreclose two railroad mortgages, V., one of the defendants answered, setting up a title to certain of the rolling stock

under a levy and sale on execution against the railroad corporation; he claiming that, as against him, the mortgages were void as to personality, because not filed as chattel mortgages. An interlocutory judgment was rendered in February, 1857, adjudging that the mortgaged property, other than that claimed by V., be sold, and referring the issues presented by his answer. Upon sale made in September, 1857, under the said judgment, the property was bid off by a committee representing the first mortgage bondholders; but a small amount, if any, of the sum bid was paid down. In March, 1858, upon petition of the receiver appointed in the action and on affidavit of the plaintiffs' attorney, an order was granted which authorized the receiver to expend a sum not exceeding \$27,500 in the purchase of necessary rolling stock for the road, on a credit, provided the purchase should be approved by plaintiffs or their attorney, and directing that sufficient of the purchase-money of the mortgaged premises be applied to pay the sum the receiver might contract to pay for the said rolling stock; which sum the order declared was thereby made "a first lien on the said mortgaged property and all proceeds thereof which may come into" the court. In August, 1858, the receiver entered into a contract with V., which was approved by plaintiffs' attorneys, by which V. released to the receiver the said rolling stock, and it was agreed that, in case it should be finally determined that said property belonged "absolutely and beneficially" to V., he should be paid \$18,000 for the release, and that the same should be a first lien upon the mortgaged property. The receiver continued in possession of the mortgaged property operating the road, apparently in the interest of the purchasers, and using the property purchased of V. until 1858. In August of that year the sale under the interlocutory judgment was completed by a conveyance to the purchasers, in which the property claimed by V. was excepted, but the receiver executed a transfer of his title and

interest and turned over said property to a new corporation organized by the purchasers to take the title and to operate the road; and it was thereafter used on the road. The consideration for the conveyance was paid almost wholly by the surrender of bonds. The claim of V., was by the final judgment in the foreclosure suit, determined in his favor, subject to the right of redemption, if any existed. In an action by V. to enforce an alleged lien upon the road given by the agreement with the receiver of August, 1858, *held*, that the order of March, 1858, was valid and binding upon the parties to the foreclosure suit and upon the bondholders, the purchasers on the foreclosure sale; as, when it was made, title had not passed under said sale; that said purchasers by their conduct and delay acquiesced in the operation and management of the road by the receiver in the usual way; that the lien authorized by said order was not simply upon the proceeds of the sale, but upon the *corpus* of the property, and, as there were no such proceeds to which the lien could attach or be transferred, it remained attached to the property and followed it into the hands of the purchasers and all subsequent assignees chargeable with notice thereof; that the agreement with V. was authorized by said order; that the determination referred to therein was of the issue raised in the foreclosure suit, and its decision in his favor entitled him to payment of the stipulated price and to a lien therefor on the mortgaged property. *Vilas v. Page*. 439

3. The order of March, 1858, was duly made at Special Term, with a direction that it be entered by the clerk. It was duly filed in the proper clerk's office and the date of filing indorsed thereon by the clerk, but, through mistake on his part, it was not transcribed on the records. *Held*, that the order became effective as an authority to the receiver upon its being filed, and the authority was not affected by the omission of the clerk to enter it. *Id*

4. A court of equity, having possession in a foreclosure suit of the property of a railroad company, has jurisdiction to authorize the creation of debts for rolling stock and other purposes, when, in its opinion, it is necessary so to do to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property. *Id*

5. The court is not divested of its power and duty of managing the property by reason of a sale which the purchasers delay or neglect for many years to complete. *Id*

See MORTGAGE

FOREIGN LAW.

In an action against a Connecticut railroad corporation for negligence, plaintiff was permitted on the trial, against defendant's exception, to read in evidence portions of the statutes of that State relating to the running of railroad trains, and the court refused to charge the jury that they were not to be influenced by said provisions. *Held*, no error. *Archer v. N. Y., N. H. & H. R. R. Co.* 589

FORGERY.

Defendant was indicted for forgery, charged as a second offense, in uttering a forged draft. An accomplice who procured the money on the draft from a bank in the city of R., testified on the trial to the commission of the crime. It appeared by other evidence that defendant had been previously convicted of the crime of forgery, sentenced and served a term in State's prison; that he and the accomplice were acquaintances and associates in the city of New York; that he was in R. and at C., a place near R., some days prior to the commission of the crime and registered at three hotels under an assumed name; that the accomplice was with de-

fendant at C. and was introduced by him to a third person. The president of the bank testified that he thought he had seen defendant in the bank. Defendant gave no explanation of his presence at R. and after his arrest declared that he did not know and had never seen the accomplice. Upon being arrested in New York he asked the detective if any one had been arrested in R., and upon being asked "why" he said "there must be somebody who had done some talking," and while denying that he committed the crime, said he knew who did it. *Held*, that there was sufficient corroboration to sustain a conviction. *People v. Elliott*. 288

FORMER ADJUDICATION.

1. In an action against an indorser of certain promissory notes it appeared that plaintiff duly obtained judgment against the makers on default. After personal service of process executions were issued and levied on a stock of goods. Thereafter proceedings in bankruptcy were commenced against the judgment debtors, and upon application of the petitioning creditors, the attorney for the plaintiff consenting, an order was made by the bankruptcy court appointing the sheriff special receiver of the bankrupt's estate, and directing him to sell the property levied on and deposit the proceeds subject to the further order of the court. The order also provided that the lien of the judgment creditors, if any, should "follow and attach to the moneys arising from the sale." In an action subsequently brought by the assignee in bankruptcy it was adjudged that plaintiff's judgments were void as against the assignee, and that the latter was entitled to the proceeds of sale of the goods, not because of any actual fraud on the part of plaintiff, but on the ground of constructive fraud, growing out of the fact that its attorney had notice of the insolvency when he commenced the actions against the bankrupts, and designed to

obtain a preference. *Held*, that the obtaining of the judgments and the levy upon the property of the bankrupts was such a transfer of property as brought the case within said provision, but that plaintiff was not debarred from proving its debt, and that, therefore, its action did not prejudice or interfere with defendant's rights as indorser and so constituted no defense. Also, that the decision of the bankruptcy court that no lien was acquired by the levy as against the assignee was conclusive, and the question was not open for contestation by the defendant. *Jefferson Co. Nat. Bk. v. Streeter*. 186

2. In an action upon a charter-party it appeared that it was executed by defendants, D. & P., on behalf of themselves and the other defendants, who were jointly interested with them as charterers. The answer set up, as a counterclaim, damages alleged to have resulted from a breach of an agreement in the charter-party on the part of plaintiffs. On the trial plaintiffs gave in evidence the judgment record in a suit in admiralty brought by D. & P. against the vessel and its owners to recover damages for the same alleged breach of contract. The record showed the libel was dismissed on the ground that the owners "had kept and performed all the covenants and undertakings in the said charter-party contained on their part." *Held*, that the said judgment was conclusive, not only against D. & P., but upon those whom they represented and who were in privity with them, although they were not made parties. *Woodhouse v. Duncan*. 527
3. It is the duty of the court, in an action brought by an executor as such, to determine the question as to his individual liability for costs, in case he is defeated; and where he is by the judgment charged with costs in a representative capacity alone, this impliedly determines that he is not liable individually; the decision is final and conclusive unless it is subsequently reversed or set aside

by a direct proceeding for that purpose. *Hone v. De Peyster*. 645

4. He may not, therefore, be charged with such costs in a collateral proceeding. *Id.*

— When order making receiver's certificates liens prior to mortgage not binding on mortgages.

See Raht v. Attrill.

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FORMER SUIT PENDING.

This action was for the conversion of a promissory note; the answer alleged a former suit pending. It appeared that in March, 1882, plaintiff commenced an action on contract against defendant to recover the proceeds of said note, and of another, both of which were delivered to defendant to sell and were unaccounted for by him, which action was instituted in reliance upon defendant's representation that the notes had been sold. Judgment was entered in that action by default in April, 1882, for the amount of both notes, and on examination of defendant in supplementary proceedings thereon, in May, 1882, it appeared that he had the note in suit here in his possession when the former action was commenced. Said judgment was vacated on plaintiff's motion, and an order procured for a commission and a reference to examine defendant, after which, in October, 1882, this action was brought. In May, 1883, after notice of trial had been served and eight days before trial, the complaint in the first action was amended so as to limit it to the other note. *Held*, that after discovery of the falsehood of defendant, plaintiff was bound promptly to elect between the then existing action, and a remedy by action *ex delicto*; that the election came too late, and the plea was good. *Bowker F. Co. v. Cox*.

535

FRANCHISE.

1. A ferry franchise does not include the carrying of freight and merchandise without the presence of

the owners; this is the business of a common carrier and may be done without interference with such franchise. *Mayor, etc., v. Starin*. 1

2. A ferry franchise is property, and the sovereign power may make an irrevocable perpetual grant of it, the same as of any other property. *Id.*

3. By the Montgomerie charter the city of New York received, not simply the political right to establish and regulate ferries, but the property in the ferry franchises from the "Island Manhattan's to any of the opposite shores all around the same island." The words "opposite shores" were not intended to limit the right granted to ferries from some point in the city to a point diametrically opposite, but the purpose was to secure to the city all the ferry franchises to and from it. *Id.*

4. Accordingly *held*, that the grant included the ferry franchises and the exclusive right to control and receive the revenues of all ferries between the city and Staten Island. *Id.*

FRAUD.

The factors' act (Chap. 179, Laws of 1830), was designed to protect persons dealing in good faith with the apparent owner of property; it does not apply where protection would secure to a wrong-doer the fruits of a fraud. *Dorrance v. Dean*. 203

HABEAS CORPUS.

1. In proceedings on writs of *habeas corpus* and *certiorari* it appeared that a female child was committed to the custody of defendant for an assumed violation of said provision. The only evidence in the record, of the proceedings before the justice, was the complaint and the commitment; in the former she was charged with having been found "improperly exposed and neglected and wandering" in a

public park "without any proper guardianship," and the commitment recited that the material allegations of the complaint were established. *Held*, that the complaint did not bring the case within the said provision, as it was not alleged that she was so exposed by those having her in charge. *People ex rel. v. N. Y. C. Protective*. 604

2. The information in such a case should be precise and bring it clearly within the statute; when it omits any essential ingredient or circumstance, and the defect is not supplied by the evidence, the conviction is bad. *Id.*
3. The complaint also charged "that the said child was found in the company of * * * who is a reputed prostitute," in violation of the provisions of the Penal Code. The return to the writs simply averred its incorporation, and that, by virtue of defendant's charter and section 292 of the Penal Code, the child was committed to its custody under a commitment, a copy of which was annexed, which recited that the conviction proceeded upon proof of the charge made. The relator traversed the return, alleging, in substance, that the child had done no act prohibited by the Penal Code, but was in the park at the time charged for an innocent and lawful purpose, and having parents with whom she resided. Defendant demurred to this traverse. *Held*, that the complaint followed substantially the language of the fourth subdivision of said section and was sufficient as matter of pleading; that the averments in the traverse admitted by the demurrer might show that the child was wrongfully convicted, but it could not be inferred therefrom that there was no evidence before the magistrate justifying the conviction; and that a retrial upon the merits could not be had in these proceedings. *Id.*
4. A summary conviction may not be set aside on *habeas corpus* or *certiorari* on averments and proof that the fact proved before the

magistrate, on which the conviction depended, was not true. *Id.*

HIGHWAYS.

1. Where, in an action to restrain the alleged unlawful use and occupancy of plaintiff's premises, he bases his right to recover in his complaint and upon the trial exclusively upon his legal title to the land and the invasion of his right as owner, he may not sustain a judgment in his favor on appeal on the ground that the *locus in quo* is a public highway in which he has rights as abutting owner which have been infringed upon by defendant. *Vail v. L. I. R. R. Co.* 283
2. The acquisition by a town of a fee in land for highway purposes by voluntary grant is within the powers conferred upon it by statute. (1 R. S. 337, § 1, subd. 2.) *Id.*

HUSBAND AND WIFE.

Where a wife authorizes her husband to contract in matters relating to, and for the benefit of her separate estate, and in executing such a contract to use the name of a firm ostensibly composed of herself and her husband, she is liable upon an obligation so executed; and this, without regard to the question as to whether such a firm in fact exists, or as to whether as matter of law they were capable of assuming the relation of copartners. *Noel v. Kinney.* 74

INDICTMENT.

1. An indictment for a statutory misdemeanor, which charges the facts constituting the crime in the words of the statute and contains averments as to time, place, person and other circumstances to identify the particular transaction is good. *People v. West.* 293
2. Under the provision of the Code

of Criminal Procedure, prescribing the form of an indictment (§ 275), it must charge both the crime and the act constituting it; the omission of either is fatal. *People v. Dumar.* 502

8. Where either one of several acts constitutes a crime, it may be charged in the same indictment as "having been committed by different means" (§ 278), but the several acts must be separately stated in different counts, and where the indictment has but one count, charging one of the acts constituting the crime, it cannot be sustained by proof that the crime was committed by different means. *Id.*
4. Where, therefore, an indictment for grand larceny charged the act constituting the crime thus, that defendant "unlawfully and feloniously did steal, take and carry away" the property described. *Held*, that the indictment could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. *Id.*
5. The distinction between the crime of larceny at common law or under the Revised Statutes and as defined by the Penal Code (§ 528), pointed out. *Id.*

INFANTS.

1. E., a married woman, died seized of a lot of land, the south west line of which, as described in the deed under which she held was near to high-water mark of the St. Lawrence river. The deed contained a reservation (so-called therein) of all the grantor's rights "to the land now under water and to the water front beyond or south-west" of the south-west line of the lot conveyed. E. died intestate, leaving her husband and two infant children her surviving. In an action of ejectment, brought by the survivors, to recover the premises embraced in the reservation, the answer of the infants denied any entry by them upon or claim of title to any land except that of which their mother was seized at the time of her death, and no evidence was given tending to show possession of or assertion of title on their part to the premises in question; nor did it appear that their mother ever entered upon or claimed any right or interest in said premises. It did appear that after the death of E., her husband entered upon the said premises, erected structures thereon and tore down a wharf erected by plaintiffs. *Held*, that the infant defendants were improperly made parties; that their joinder as such was not justified by the Code of Civil Procedure (§ 1503), and the complaint should have been dismissed as to them; that they were not bound by the acts of their father, as these acts must be referred to his own interest and title as life tenant, not to the title of the remaindermen. *Sisson v. Cummings.* 56
2. The requirements of the statute in reference to the sale of an infant's real estate must be strictly pursued in order to validate such a sale. *Ellwood v. Northrup.* 172
3. The burden is upon one claiming under a title, acquired at such a sale, to establish by affirmative evidence that every requirement necessary to give jurisdiction has been complied with; there is no presumption of compliance in the absence of proof. *Id.*
4. In an action of ejectment defendants claimed title under a conveyance in proceedings under the Revised Statutes providing for the sale of real estate belonging to infants. (2 R. S. 194, § 167 *et seq.*) The only proof of compliance with the statute was of the presentation of a petition to the county judge for a sale and appointment of a special guardian, the appointment, the execution by the guardian of a bond and the approval thereof. No reference to a master or referee to inquire into the merits of the application as required (§ 175) was proved, or that the court was informed of the situation and value of the land,

the reason for its sale, the name of the intended purchaser, the price to be paid or the manner of payment; nor was it shown that a sale was ordered or the contract of sale confirmed (§§ 177, 178). *Held*, that a valid sale was not established and the purchaser acquired no title under the conveyance. *Id.*

— *Effect of order allowing infant plaintiff to prosecute as a poor person. See Shearman v. Pope. (Mem.) 664*

See ABANDONMENT (OF CHILDREN).

INJUNCTION.

1. Any person who invades the rights of the owner of a ferry franchise by running a ferry himself, is liable for any damages he thus causes the owner, and may be restrained by the court. *Mayor, etc. v. Starin.* 1
2. *It seems*, however, the courts will not restrain the operation of a ferry which is demanded by the public convenience simply because the franchise belongs to another, who neglects or refuses to use it. *Id.*
8. Plaintiff was lessee of certain premises, upon which was a hotel, formerly separated from defendant's premises by a strip of land thirty feet wide. This strip, in the deed under which defendant claimed, which was from W., the then owner of the whole property, was described as thereby dedicated for the purposes of a public street; the dedication was never accepted by the public. The deed from W. stated that the conveyance was for the purpose of a railroad depot only, and the grantee erected a depot upon the premises. W. devised the remaining property, one-fourth to each of four devisees. On partition of the hotel property, not including the strip of thirty feet, two of the devisees became the owners. They subsequently quit-claimed to defendant's predecessor an undivided one-half of that portion of the strip in question, twenty feet

wide, adjoining the land so conveyed by W. The deeds contained a provision to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed. The hotel was accessible from the depot across said strip, and depended largely for its patronage upon the passengers arriving at and departing from the depot. Defendant, on succeeding to the title of W.'s grantee, built a high and substantial fence the whole length of the strip, on the line between the twenty feet so conveyed and the remaining ten feet, with no opening therein, thus cutting off all passage between the hotel and depot. In an action, among other things, to restrain the continuance of the fence, *held*, that by the failure to accept the dedication, the thirty feet strip remained the property of W., and descended to his devisees at his death; that plaintiff, as lessee of the grantors, could not question the validity of the quit-claim deeds which must be regarded as conveying all the interest of the grantors in the twenty feet, and they thereby abandoned all claim to the same as a public highway; but that the provision in the deeds as to an opening was a covenant running with the land conveyed; that such covenant made the right of passage across the twenty feet a right or easement appurtenant to the hotel property, and so it was enforceable by plaintiff as lessee of such property; and that, therefore, the action was maintainable. *Avery v. N. Y. C. & H. R. R. Co.* 142

4. The judgment below directed the removal of the whole fence. *Held*, error; that plaintiff was simply entitled to an opening opposite to the hotel of sufficient size to permit the convenient passage of, and at no time to be closed against, passengers and their baggage. *Id.*

— *Assignee of covenant by a vendor of stock, good will, etc., of a business that he will not engage in same business within certain bounds, may maintain action to restrain breach of covenant.*

See D. M. Co. v. Roeber. 478

INSOLVENT CORPORATIONS.

Before the dissolution of the defendant by the judgment in this action and the appointment of a receiver of its property, a judgment had been recovered against it in a United States Circuit Court upon a policy of insurance theretofore issued by it. Defendant had taken the case, by writ of error, to the United States Supreme Court for review, had given a bond with sureties, and had given as indemnity to the latter a mortgage upon certain of its property and an assignment of a mortgage. The receiver, on application to the court which appointed him, was directed to employ counsel to argue the cause on hearing of the writ of error. The judgment was reversed and a new trial granted. Subsequently the plaintiffs in that action took judgment by default. The receiver was never made a party thereto and took no part in the conduct of the defense. Said judgment was presented as the basis of a claim to a share in the funds of the dissolved corporation in the hands of the receiver, and it was claimed that the receiver was concluded thereby. *Held*, that as to the defendant of record, its dissolution put an end to the action, and at the time of the rendition of the judgment it had no property against which a judgment could be enforced; that the receiver could not be affected by said judgment unless he had by some action, under the direction of the court appointing him, made himself responsible for the final result; that his intervention in the United States Supreme Court did not make him so responsible, as it was simply for the purpose of protecting the assets in his hands from an incumbrance which had no connection with the subject-

matter of the litigation, and the reversal of the judgment ended his connection with the action, and the parties litigant were thereby restored to the same position in which they were prior to its rendition; that the United States Circuit Court acquired no jurisdiction over him or over the funds sought to be reached by its adjudication; and that, therefore, the receiver was not estopped by the judgment. *People v. Knick. L. Ins. Co.* 619

INSURANCE (FIRE).

1. An agent of an insurance company, who, with the knowledge of the company, had been in the habit of filling in applications for insurance, wrote in an application that the building on which insurance was desired was occupied as a residence by a tenant. The statement made by the applicant was that the building was unoccupied, but when occupied it was by a tenant. The applicant, supposing his statement to have been written in correctly, signed the application without noticing the misstatement. The policy contained a provision to the effect that if the building insured should cease to be occupied as a dwelling "or be so unoccupied at the time of effecting insurance and not so stated in the application," the policy shall be null and void "until the written consent of the company is obtained." In an action upon the policy, *held*, that the error of the agent could not be imputed to defendant; that the misstatement was as between the parties, that of the agent not of the plaintiff, and the fact of non-occupation must be deemed to have been stated in the application, and so it did not constitute a breach of warranty. *Bennett v. Agricultural Ins. Co.* 243
2. After the policy was issued, a tenant took possession and occupied for a time and then moved out, leaving the house again unoccupied. It was claimed by defendant that treating the policy

- as a valid contract of insurance upon an unoccupied building, yet it being afterwards occupied, a discontinuance of the occupation brought the case within the first condition of the clause quoted and forfeited the policy. *Held*, untenable; that the condition applied only where the premises insured were occupied when the policy was issued; that when the insurance was upon unoccupied premises the insured had the right to leave them vacant all or any portion of the time. *Id.*
3. On the trial the referee granted a motion on behalf of plaintiff to amend the application so as to make the statement therein conform to that actually made by plaintiff. *Held*, no error. *Id.*
4. A policy of insurance, executed by defendant to plaintiff, recited that E. & Co., "by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month." It was covenanted in and by the policy that, in case the premises occupied by E. & Co. should be damaged by fire, "so as to cause a diminution, of said royalties," defendant would pay "the amount of such diminution, during the restoration of said premises to their producing capacity, immediately preceding said fire." *Held*, that the insurance was not limited to the guaranteed minimum, but covered all the royalties, payable by E. & Co. under their contract; that, as so construed, the policy was not void as a wager policy; that while, beyond the amount guaranteed, the royalties were contingent, as E. & Co. could limit their production so that it yield no royalties beyond that amount, yet, as it appeared that their license from plaintiff was an exclusive one, and as, therefore, if their business was lessened or restricted because of a fire, plaintiff could not license others, but must bear the loss of the diminished royalties, against that risk, which was necessarily connected with the premises, it was lawful to insure. *Nat. F. Oil Co. v. Citizens' Ins. Co.* 535
5. An interest, legal or equitable, in property, is not necessary to support an insurance upon it; it is sufficient if the assured is so situated as to be liable to loss if the property be destroyed by the peril insured against. *Id.*
6. Also *held*, that it was competent to give in evidence the contract between plaintiff and E. & Co. *Id.*
7. Also, *held*, that the recovery could not be limited to loss of royalties on the oil actually burned, as the principal loss arose from the enforced idleness of the works; and that it was competent on the question of damages to prove the royalties paid for two months immediately preceding the fire, and those paid during the restoration of the works, and for some months thereafter. *Id.*
8. A policy of fire insurance contained a provision declaring that "the working of carpenters * * * and other mechanics in * * * altering or repairing" the building covered by the policy, would cause a forfeiture of all claims under it, unless the written consent of the company was indorsed thereon. It also provided that if the risk should be increased by any means within the control of the assured the policy would be void. The building was, at the time of the insurance, occupied as a grocery store. In an action upon the policy it appeared that plaintiff, after it was issued, leased the building to be used for the purpose of carrying on the fruit drying business, which required substantial alterations in the building, among others the removal of portions of two floors and the roof, and the construction of large wooden flues extending up through the building from the cellar and above the roof. These alterations were being made without defendant's consent, and while carpenters were engaged in the work the building was destroyed by fire. *Held*, that the evidence showed a violation

of the conditions of the policy which rendered it void; and that a submission of the question to the jury was error. *Mac's v. Roch. Ger. Ins. Co.* 560

INSURANCE (LIFE).

Before the dissolution of the defendant by the judgment in this action and the appointment of a receiver of its property, a judgment had been recovered against it in a United States Circuit Court upon a policy of insurance theretofore issued by it. Defendant had taken the case, by writ of error, to the United States Supreme Court for review, had given a bond with sureties, and had given as indemnity to the latter a mortgage upon certain of its property and an assignment of a mortgage. The receiver, on application to the court which appointed him, was directed to employ counsel to argue the cause on hearing of the writ of error. The judgment was reversed and a new trial granted. Subsequently the plaintiffs in that action took judgment by default. The receiver was never made a party thereto and took no part in the conduct of the defense. Said judgment was presented as the basis of a claim to a share in the funds of the dissolved corporation in the hands of the receiver, and it was claimed that the receiver was concluded thereby. *Held*, that as to the defendant of record, its dissolution put an end to the action; and at the time of the rendition of the judgment it had no property against which a judgment could be enforced; that the receiver could not be affected by said judgment unless he had by some action, under the direction of the court appointing him, made himself responsible for the final result; that his intervention in the United States Supreme Court did not make him so responsible, as it was simply for the purpose of protecting the assets in his hands from an incumbrance which had no connection with the subject-matter of the

litigation, and the reversal of the judgment ended his connection with the action; and the parties litigant were thereby restored to the same position in which they were prior to its rendition; that the United States Circuit Court acquired no jurisdiction over him or over the funds sought to be reached by its adjudication; and that, therefore, the receiver was not estopped by the judgment. *People v. Knick. L. Ins. Co.* 619

JUDGMENT.

— When receiver of insolvent insurance company not estopped by judgment against it.

See *People v. K. L. Ins. Co.* 619

JUDICIAL SALE.

1. The requirements of the statute in reference to the sale of an infant's real estate must be strictly pursued in order to validate such a sale. *Ellwood v. Northrup.* 172
2. The burden is upon one claiming under a title, acquired at such a sale, to establish by affirmative evidence that every requirement necessary to give jurisdiction has been complied with; there is no presumption of compliance in the absence of proof. *Id.*
3. In an action of ejectment defendants claimed title under a conveyance in proceedings under the Revised Statutes providing for the sale of real estate belonging to infants. (2 R. S. 194, § 167 *et seq.*) The only proof of compliance with the statute was of the presentation of a petition to the county judge for a sale and appointment of a special guardian, the appointment, the execution by the guardian of a bond and the approval thereof. No reference to a master or referee to inquire into the merits of the application as required (§ 175) was proved, or that the court was informed of the situation and value of the land, the reason for its sale, the name of the intended pur-

chaser, the price to be paid or the manner of payment; nor was it shown that a sale was ordered or the contract of sale confirmed (§§ 177, 178). *Held*, that a valid sale was not established and the purchaser acquired no title under the conveyance. *Id.*

JURISDICTION.

Where, after an order requiring an infant plaintiff to file security for costs and staying proceedings until the order was complied with, and pending a motion to dismiss the complaint because of a failure to comply with the order, the court granted an order allowing plaintiff to prosecute the action as a poor person. *Held*, that the stay did not deprive the court of jurisdiction to make the second order; and that such order was an answer to the motion to dismiss. *Shearman v. Pope.* 664

LACHES.

In January, 1883, M. made an assignment for the benefit of creditors, among the property assigned were certain stereotype and electrotype plates then in the possession of L. & D., as custodians for M., upon which was a chattel mortgage, which was not filed until the day of the execution of the assignment. In March, 1883, L. & D. recovered a judgment against M. for a debt accruing prior to January, and attempted to levy upon the plates by virtue of an execution issued thereon. By an order made in this action the assignee was removed and a receiver *pendente lite*, of the assigned property appointed. In proceedings instituted by the receiver against L. & D., who had refused to deliver up the plates, it was adjudged that said firm had no lien and that the receiver was entitled to possession. The plates were thereupon, and previous to July, 1883, delivered to the receiver. In March, 1884, the receiver applied *ex parte* for directions as to the disposition of the property,

and an order was thereupon made directing a sale of the plates and payment of the mortgage debt out of the proceeds; this the receiver did. In November, 1884, L. & D. petitioned to have the *ex parte* order vacated so far as it directs the payment of the mortgage. *Held*, that the petition was properly denied; that as, at the time of the sale, L. & D. had no lien upon the property, their remedy, if any, was to obtain an order of the court directing as to the disposition of the proceeds, and until this was done it was the duty of the receiver to proceed under the order of the court; that when the mortgage became payable the mortgagee, in the absence of fraud, became entitled, as against the mortgagor and his representatives, and all other persons who had not acquired liens, to demand, receive and sell the mortgaged property; that after waiting a reasonable time to enable the petitioners to take steps, if they desired, to establish a right to the property, it was the duty of the receiver to apply for and take the directions of the court, and he was under no obligation to give notice to the general creditors; and that the petitioners having laid still from July, 1883, to November 1, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property, if they had any equitable interest (as to which, *quære*), they had lost it by their laches. *Sullivan v. Muller.* 635

— When decision of court below as to laches not reviewable here.
See W. P. Bank v. Gerry. 467

LARCENY.

1. Where an indictment for grand larceny charged the act constituting the crime thus, that defendant "unlawfully and feloniously did steal, take and carry away" the property described. *Held*, that the indictment could not be sustained by proof that the defendant obtained possession of the prop-

erty from the owner upon a sale on credit induced by false and fraudulent representations. *People v. Dumar.* 502

2. The distinction between the crime of larceny at common law or under the Revised Statutes and as defined by the Penal Code (§ 528), pointed out. *Id.*

LEASE.

— By receiver appointed in partition suit, when court may authorize, and effect of.
See Weeks v. Weeks. 626

LIEN.

1. Plaintiff conveyed to his son I. certain premises by deed with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and without the knowledge or consent of plaintiff, executed to defendant McK. a mortgage for \$5,000, the consideration therefor being partly certain claims held by McK. against I. and the balance a check payable to the order of I. which he transferred on the same day to plaintiff. McK. had knowledge at the time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was at the time of such assignment in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. *Held*, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and the burden of proving good faith in the transaction was upon him, and in the absence of such proof, plaintiff was entitled to the relief sought. *Seymour v. McKinstry.* 230
2. The lien of a vendor of real estate for unpaid purchase-money is good against the vendee and the whole world, unless waived or defeated by an alienation of the property by the vendee to a purchaser without notice. *Id.*
3. In an action by the vendor to enforce his lien, as against a mortgage executed by the vendee, it is not necessary for the plaintiff to allege in his complaint that he has not waived his lien or that the defendant took with notice; waiver or want of notice must be set up in the answer and proved as a defense. *Id.*
4. The lien of a mortgage attaches not only to the land in the condition in which it was at the time of its execution, but as changed or improved by accretions or by labor expended upon it while the mortgage is in existence; and creditors, whose debts were created for money, labor or materials used in the improvement, acquire no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. *Rahl v. Attrill.* 423
5. The R. B. I. Co. was organized for the purpose of erecting and managing a hotel. It purchased lands subject to a mortgage, and to raise funds to build the hotel sold and hypothecated its bonds secured by a trust mortgage on the hotel property. Having exhausted all of its available means, and being indebted to a large amount for labor, materials, etc., before the completion of the building, in an action brought by

a stockholder to dissolve the corporation, a receiver was appointed, who by an *ex parte* order in said action was authorized to borrow on his certificates \$180,000 for the "purpose of paying the employees of said company," which certificates were declared by the order to be a first lien, prior to the trust mortgage. Neither the trustee nor the bondholders were then parties to the action, and they had no notice of the application for the order. Under said order \$110,000 of certificates were issued by the receiver. On foreclosure of the original mortgage a surplus arose, and in proceedings to determine the priority of claims thereto, *held*, the fact the company was owing debts for labor created no equity for their payment in preference to the bondholders; and that so much of the order as made the certificates prior liens was void. *Id.*

6. In the surplus money proceedings the order was sought to be sustained on the ground that when it was granted a large number of laborers whose wages were in arrears were absolutely destitute, had become riotous, and threatened, unless paid, to burn the hotel building, and the referee found that but for the advancement of money on the certificates which enabled the receiver to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have been destroyed or seriously injured." *Held*, that this did not justify the order; that the debt so created by the receiver was not one for preservation; that it could not be assumed that the ordinary agencies of the law were insufficient to furnish the requisite protection. *Id.*
7. In an action to foreclose two railroad mortgages, V., one of the defendants answered, setting up a title to certain of the rolling stock under a levy and sale on execution against the railroad corporation; he claiming that, as against him, the mortgages were void as to personality, because not filed as chattel mortgages. An interlocutory judgment was rendered in

February, 1857, adjudging that the mortgaged property, other than that claimed by V. be sold, and referring the issues presented by his answer. Upon sale made in September, 1857, under the said judgment, the property was bid off by a committee representing the first mortgage bondholders; but a small amount, if any, of the sum bid was paid down. In March, 1858, upon petition of the receiver appointed in the action and on affidavit of the plaintiffs' attorney, an order was granted which authorized the receiver to expend a sum not exceeding \$27,500 in the purchase of necessary rolling stock for the road, on a credit, provided the purchase should be approved by plaintiffs or their attorney, and directing that sufficient of the purchase-money of the mortgaged premises be applied to pay the sum the receiver might contract to pay for the said rolling stock, which sum the order declared was thereby made "a first lien on the said mortgaged property and all proceeds thereof which may come into" the court. In August, 1858, the receiver entered into a contract with V., which was approved by plaintiffs' attorneys, by which V. released to the receiver the said rolling stock, and it was agreed that, in case it should be finally determined that said property belonged "absolutely and beneficially" to V. he should be paid \$18,000 for the release, and that the same should be a first lien upon the mortgaged property. The receiver continued in possession of the mortgaged property operating the road, apparently in the interest of the purchasers, and using the property purchased of V. until 1868. In August of that year the sale under the interlocutory judgment was completed by a conveyance to the purchasers, in which the property claimed by V. was excepted, but the receiver executed a transfer of his title and interest and turned over said property to a new corporation organized by the purchasers to take the title and to operate the road; and it was thereafter used on the road. The consideration

for the conveyance was paid almost wholly by the surrender of bonds. The claim of V. was by the final judgment in the foreclosure suit determined in his favor, subject to the right of redemption, if any existed. In an action by V. to enforce an alleged lien upon the road given by the agreement with the receiver of August, 1858, *held*, that the order of March, 1858, was valid and binding upon the parties to the foreclosure suit and upon the bondholders, the purchasers on the foreclosure sale; as when it was made, title had not passed under said sale; that said purchasers by their conduct and delay acquiesced in the operation and management of the road by the receiver in the usual way; that the lien authorized by said order was not simply upon the proceeds of the sale, but upon the *corpus* of the property, and, as there were no such proceeds to which the lien could attach or be transferred, it remained attached to the property and followed it into the hands of the purchasers and all subsequent assignees chargeable with notice thereof; that the agreement with V. was authorized by said order; that the determination referred to therein was of the issue raised in the foreclosure suit, and its decision in his favor entitled him to payment of the stipulated price and to a lien thereon on the mortgaged property. *Vilas v. Page.* 430

8. Also, *held*, that the costs adjudged in favor of V. in the foreclosure suit were not included in his agreement with the receiver, and could not be charged as a lien upon the property. *Id.*

9. A court of equity, having possession in a foreclosure suit of the property of a railroad company, has jurisdiction to authorize the creation of debts for rolling stock and other purposes, when, in its opinion, it is necessary so to do to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property. *Id.*

MANUFACTURING CORPORATIONS.

1. The penalty imposed by the General Manufacturing act (§ 12, chap. 40, Laws of 1848), upon trustees of a corporation organized under it, for failure to make and file the prescribed annual report, is not applicable to, and is not incurred by, a non-compliance with the provision of the act of 1853 (§ 2, chap. 333, Laws of 1853), which requires that in all statements and reports which are to be published of a company, any portion of the stock of which has been issued in payment for property, "it shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact." *Whitaker v. Masterton.* 277

2. An annual report filed by a manufacturing corporation stated the amount of its capital and that all of it had "been paid in in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business and for which stock to the amount of the value thereof has been issued by the company." In an action by a creditor of the corporation against the trustees for alleged failure to make the prescribed report, *held*, that the report made was a sufficient compliance with the requirements of the act; that it was not necessary to specify therein how much of the capital was paid in cash and what amount in property; and that, therefore, the action was not maintainable. *Id.*

3. The provision of the act imposing the penalty is to be construed like other penal statutes; its scope may not be enlarged by construction or implication, and the penalty may not be imposed except in cases where the plain language of the provision requires it. *Id.*

MARRIED WOMEN.

1. Where a wife authorizes her husband to contract in matters re-

lating to, and for the benefit of her separate estate, and in executing such a contract to use the name of a firm ostensibly composed of herself and her husband, she is liable upon an obligation so executed; and this without regard to the question as to whether such a firm in fact exists, or as to whether, as matter of law, they were capable of assuming the relation of copartners. *Noel v. Kinney.* 74

2. As to all contracts, relating to her separate estate or made in the course of her separate business, a married woman stands at law on the same footing as if unmarried, and can, therefore, make or authorize her husband as agent to make for her negotiable paper which will be governed by the law merchant; and may be sued upon it in the ordinary way, by general complaint, without special averments. *Id.*
3. A married woman may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris.* *Id.*

MASTER AND SERVANT.

1. To authorize a recovery in an action by a servant against his master for injuries received by the former in the course of his employment, the evidence must establish personal fault on the part of the master, or, what is equivalent thereto; and he is entitled to the benefit of the presumption that he has performed his duty, until the contrary is shown. *Cahill v. Hilton.* 512
2. So, also, the plaintiff is required to show affirmatively his own freedom from negligence; and while this is usually a question of fact and the absence of contributory negligence is often to be inferred from the nature of the accident and the circumstances of the case, that conclusion cannot legally be reached, unless such circumstances are proved as legiti-

mately and reasonably lead to such a result; and if the facts proved do not fairly tend to support a presumption of freedom from negligence, the question becomes one of law for the court. *Id.*

MILK.

1. Under the act of 1885 (Chap. 183, Laws of 1885, as amended by chap. 458 of that year), prohibiting the sale of adulterated milk; and making the violation of the prohibition a misdemeanor, criminal knowledge or intent forms no element of the offense. *People v. Kibler.* 321
2. All that is requisite to establish the offense is to show a sale of milk falling below the standard fixed by the act and coming within its definition of adulterated milk. *Id.*
3. If the sale was of skimmed milk, and if such sale is within the exception of the statute (as to which, *quære*), this is matter of defense. *Id.*
4. The act as thus construed is constitutional. *Id.*

MISDEMEANOR.

1. An indictment for a statutory misdemeanor, which charges the facts constituting the crime in the words of the statute and contains averments as to time, place, person and other circumstances to identify the particular transaction is good. *People v. West.* 298
2. Under the act of 1885 (Chap. 183, Laws of 1885, as amended by chap. 458 of that year), prohibiting the sale of adulterated milk; and making the violation of the prohibition a misdemeanor, criminal knowledge or intent forms no element of the offense. *People v. Kibler.* 321
3. All that is requisite to establish the offense is to show a sale of milk falling below the standard

fixed by the act and coming within its definition of adulterated milk. *Id.*

4. If the sale was of skimmed milk, and if such sale is within the exception of the statute (as to which, *quære*), this is matter of defense. *Id.*

5. The act as thus construed is constitutional. *Id.*

MORTGAGE.

1. Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgage debt, and the remainder is liable as security merely. *Wilcox v. Campbell.* 325

2. The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt. *Id.*

3. This obligation on the part of the purchaser is not affected by its conveyance; and, if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused to him. *Id.*

4. The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and, if he fails so to do and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Id.*

5. The rule which requires a party exposed to injury or damage to make the loss as small as he reasonably can, does not require the grantee of the remainder to advance the money to pay the mortgage for the purpose of protecting himself and his land. *Id.*

6. The lien of a mortgage attaches not only to the land in the condition in which it was at the time of its execution, but as changed or improved by accretions or by labor expended upon it while the mortgage is in existence; and creditors, whose debts were created for money, labor or materials used in the improvement, acquire no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. *Rahiv. Attrill.* 423

7. The R. B. I. Co. was organized for the purpose of erecting and managing a hotel. It purchased lands subject to a mortgage, and to raise funds to build the hotel sold and hypothecated its bonds secured by a trust mortgage on the hotel property. Having exhausted all of its available means, and being indebted to a large amount for labor, materials, etc., before the completion of the building, in an action brought by a stockholder to dissolve the corporation, a receiver was appointed, who by an *ex parte* order in said action was authorized to borrow on his certificates \$130,000 for the "purpose of paying the employees of said company," which certificates were declared by the order to be a first lien, prior to the trust mortgage. Neither the trustee nor the bondholders were then parties to the action, and they had no notice of the application for the order. Under said order \$110,000 of certificates were issued by the receiver. On foreclosure of the original mortgage a surplus arose, and in proceedings to determine the priority of claims thereto, *held*, the fact the company was owing debts for labor created no equity for their payment in preference to the bondholders; and that so much of the order as made the certificates prior liens was void. *Id.*

8. In the surplus money proceedings the order was sought to be sustained on the ground that when it was granted a large number of laborers whose wages were in arrears were absolutely destitute, had become riotous, and threatened, unless paid, to burn the hotel

building, and the referee found that but for the advancement of money on the certificates which enabled the receiver to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have been destroyed or seriously injured." *Held*, that this did not justify the order; that the debt so created by the receiver was not one for preservation; that it could not be assumed that the ordinary agencies of the law were insufficient to furnish the requisite protection. *Id.*

9. Also, *held*, that the granting of the order without notice to the mortgagee or bondholders did not bind them as an adjudication; that they were entitled to notice and an opportunity to be heard. *Id.*

**See CHATTEL MORTGAGE.
FORECLOSURE.**

MOTIONS AND ORDERS.

1. Although it appears by the opinion of the General Term that a judgment in an action tried by the court was reversed upon the facts; yet if this does not appear in the order of reversal this court is bound to presume that the reversal was upon questions of law only. *Levitt v. Barton.* 70
2. The members of a firm contracted for the purchase for the firm of certain real estate, the title was taken in the name of one of them for their joint benefit, the grantee giving back a mortgage for the purchase money. *Held*, that the other two partners were entitled to be made parties defendant; and that the questions as to whether a valid trust was created in their favor, or as to whether they were in a position to defend against the mortgage could not properly be determined on a motion to have them brought in as parties, but were questions to be litigated on trial of the action. *Johnston v. Donovan.* 269

878), in reference to the examination of a party to an action before trial, do not absolutely bind the judge to whom application is made for such an examination to grant an order, although the affidavit presented in form conforms to the requirements of said provisions. *Jenkins v. Putnam.* 272

4. Where, from the nature of the action and the other facts disclosed, the judge can see that the examination is not necessary; that it is sought merely for annoyance or delay, he may, in his discretion, deny the application. *Id.*
 5. Conceding the provision requiring the judge to make the order to be mandatory, it does not interfere with the power of the Supreme Court; it may, on motion, in the exercise of its discretion upon all the facts appearing, vacate the order and leave the party to take the examination on the trial. *Id.*
 6. An order vacating an order for the examination of a party is not reviewable here, unless it appears from it that the decision was placed upon some ground of law not involving discretion. *Id.*
 7. Where, after an order requiring an infant plaintiff to file security for costs and staying proceedings until the order was complied with, and pending a motion to dismiss the complaint because of a failure to comply with the order, the court granted an order allowing plaintiff to prosecute the action as a poor person. *Held*, that the stay did not deprive the court of jurisdiction to make the second order; and that such an order was an answer to the motion to dismiss. *Shearman v. Pope.* 664
- Order duly granted and filed, valid and effective from time of filing, and not affected by omission of clerk to enter.
See Vilas v. Page. 489

MUNICIPAL CORPORATIONS.

1. The provision of the Code of Civil Procedure (§ 3245), prohibit-

3. *It seems* that the provisions of the Code of Civil Procedure (§§ 870,

ing the allowance of costs to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for money only, unless the claim was before the commencement of the action presented for payment to the chief fiscal officer of the corporation, does not apply to an action for the recovery of damages for injuries caused by the negligence of the servants of the corporation. *Gage v. Vil. of Hornellsville.* 667

2. It seems that the chief fiscal officer of a village is its treasurer, not its board of trustees. *Id.*

See BROOKLYN (CITY OF).
NEW YORK (CITY OF).

NEGLIGENCE.

1. Plaintiff, a passenger on defendant's road, in attempting to step from the car to the station platform missed the platform, fell between it and the car and was injured. In an action to recover damages for the injuries the following facts appeared: The distance between the platform and the car was eleven inches. The lower step of the car was eight inches below the top of the platform, and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from the second step without having hold of the iron railing on either side and without looking to see the station platform. The platform had been used for many years by passengers, and prior to the accident no one had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order or improperly constructed. *Held*, the facts did not justify a
- verdict for plaintiff; and that a refusal to direct a verdict for defendant was error. *Laffin v. B. & S. W. R. R. Co.* 136
2. As a general rule where an appliance, machine or structure, not obviously dangerous, has been in daily use for years and has uniformly proved adequate, safe and convenient, it may be continued without the imputation of negligence. *Id.*
3. It is not the duty of a railroad company to furnish some one to aid passengers in alighting from its cars. *Id.*
4. In an action to recover damages for alleged negligence on the part of defendant causing the death of W., plaintiff's intestate, it appeared that W. was struck by one of defendant's cars and killed at a street crossing in the village of H. Six tracks cross the street at this point. W. approached the crossing along the street on foot from the north, the line of the street and of the rails as they approach, the former from the north, the latter from the west, make quite an acute angle. The first track is a switch, and the car which struck W. was not attached to any engine, but was pushed or "kicked" down from the west on said track: it was moving by its own momentum at a rate of not over four miles an hour. The accident occurred in the middle of a bright, clear day. Up to a point on the street thirty-one and a half feet northerly from the crossing the switch could not be seen, as a building obstructed the view, but at that point it could be seen to the west for a distance of fifty-seven feet from the crossing. When within ten feet of the track it could be seen one hundred and thirty-seven feet. The switch was used for the delivery of coal for the village, and the cars containing coal were habitually shunted down the switch to the place of delivery. W. was employed in a coal yard near the crossing and was perfectly familiar with the crossing and the use made of the switch. *Held* (RUGER, Ch. J., ANDREWS

and DANFORTH, JJ., dissenting), that the facts made it absolutely certain either that W. looked and, seeing the car coming, undertook to cross in front of it, or did not look when it was his duty, and was, therefore, chargeable with contributory negligence; and that a submission of the question to the jury was error. *Woodard v. N. Y., L. E. & W. R. R. Co.* 869

5. Also held, the fact that trains were moving past the crossing on the other tracks, south of the switch, did not authorize an inference that the decedent's attention was so diverted as to excuse his omission to look and see if the track was clear. *Id.*

6. To authorize a recovery in an action by a servant against his master for injuries received by the former in the course of his employment, the evidence must establish personal fault on the part of the master, or what is equivalent thereto; and he is entitled to the benefit of the presumption that he has performed his duty, until the contrary is shown. *Cahill v. Hilton.* 512

7. So, also, the plaintiff is required to show affirmatively his own freedom from negligence; and while this is usually a question of fact and the absence of contributory negligence is often to be inferred from the nature of the accident and the circumstances of the case, that conclusion cannot legally be reached, unless such circumstances are proved as legitimately and reasonably lead to such a result; and if the facts proved do not fairly tend to support a presumption of freedom from negligence, the question becomes one of law for the court. *Id.*

8. In an action to recover damages for personal injuries alleged to have been caused by defendants' negligence, the following facts appeared: Plaintiff was employed as general helper in the gig room of defendants' carpet factory. The superintendent and the foreman of the factory had been expressly directed by the defendants not to

allow the machinery to be repaired while in motion. The gigs were operated by leather belts running over drums or pulleys. One of the belts, the laces of which had become loose, had been thrown off the gig-wheel and was dangling from the shaft overhead. Plaintiff was requested by a fellow-workman to place the belt upon nails driven near the shaft for the purpose of stopping its revolution so that it could be relaced. A ladder, which had been in general use about the factory for a number of years, was, at the time, fastened by hooks to a scantling, and was so situated as to enable plaintiff to reach the belt from it. He testified that he ascended the ladder, placed his right arm around a beam near his head, seized the belt with his left hand and attempted to lift it to throw it over the nails when he became unconscious. The belt was revolving toward him and downward. Plaintiff was found lying unconscious upon the floor at the foot of the ladder, the ladder and the scantling were broken and lay in pieces on the floor, around and partly upon him. Plaintiff's left arm was severed from the body and was found lying on the floor from six to ten feet from it and back of the shaft. There was no necessity for lacing the belts while the machinery was in motion; it had been at rest during the noon intermission and the accident happened immediately after it had again been put in motion. Plaintiff admitted that he had frequently performed this service before and always in the same manner, and that he knew it to be a hazardous undertaking. The claim of negligence was that the ladder was defective; there was no proof that defendants were aware that it was used for such a purpose. *Held*, the evidence clearly showed the injury did not result from any defect in the ladder; but if so, plaintiff alone was chargeable with negligence in electing to perform the service in a way known by him to be dangerous, rather than adopt the precautions which would have made it entirely safe. *Id.*

9. In an action to recover damages for alleged negligence, it appeared that plaintiff was a passenger in a train on defendant's road, and as the train approached his destination he arose from his seat and went to the end of the car to get some baggage. On his return he tripped and fell over a board which a brakeman had placed across the aisle from one seat to the one opposite and was injured. The brakeman was called as a witness for the defendant and testified that he was standing, or about to get up, on the board when plaintiff came up and asked to be permitted to pass; the witness, in doing this, cautioned him to be careful about or look out for the board. On cross-examination said witness was asked if he did not state to plaintiff, on the train, that he had forgotten to remove or slide back the board and that it was his fault, that he was careless. This was objected to; objection overruled and witness answered, denying any such conversation, and he denied having any conversation with plaintiff after the accident. Plaintiff was subsequently recalled, and, after testifying that he did have a conversation with the brakeman, was asked to state it. This was objected to; objection overruled and exception taken. Plaintiff in giving the conversation did not testify that the brakeman stated it was his fault, but on being directed by the court to repeat the conversation included that statement. *Held*, that the reception of the evidence was error; that it did not legitimately tend to impeach or contradict the direct testimony of the brakeman; also, the fact that the declaration was called out by the court, not in response to the question of plaintiff's counsel, and that no motion was made to strike it out did not deprive defendant of the benefit of the exception; that as the court had already ruled that the conversation was proper it was not necessary to repeat the objection. *Sherman v. D., L. & W. R. R. Co.*
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for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, as a passenger on the road of the N. Y. & N. E. R. R. Co., came into the depot at Hartford, Conn., which depot was built and used in common by that company and the defendant. There were exits from the depot on the east and west sides. Plaintiff, who had never before been in Hartford, followed a number of other passengers out of the depot on to a platform running along its east side. One of defendant's tracks ran outside of the depot along near the platform, so close that its cars moving thereon overlapped the platform two or three inches and more according to the oscillations of the car. Cabmen were standing about ten feet from the platform, one of whom approached plaintiff and was engaged by him. He took part of plaintiff's baggage and proceeded to his cab a few feet distant, leaving plaintiff on the platform, when one of defendant's trains, moving at an unusually rapid rate upon the track, over which the cabman had just passed, struck plaintiff and inflicted the injury. It was a dark, hazy evening. Plaintiff did not know of the existence of the track and did not see it. Both he and the cabman testified that they did not see the train or know of its approach and heard no bell or whistle. *Held*, that the evidence justified a submission of the case to the jury and was sufficient to sustain a verdict for plaintiff; that he was entitled to a safe passage out of the depot and had a right to act upon the assumption that every necessary and reasonable precaution would be taken to make it safe; that he had a right to regard the platform as a safe and proper place; and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of outgoing and incoming passengers, and so near a platform provided for them as to sweep a portion of it, was negligence. *Archer v. N. Y., N. H. & H. R. R. Co.*
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10. In an action to recover damages

11. In an action against a railroad

company to recover damages for an injury to a passenger caused by the falling upon him of an article placed in a rack over his seat by another passenger, *held*, that in looking for and protecting passengers from such dangers, a carrier was not required to exercise the highest care which human vigilance can give, but only reasonable care, to be measured by the circumstances surrounding each case. *Morris v. N. Y. C. & H. R. R. R. Co.* 678

NEW YORK (CITY OF).

1. By the Montgomerie charter the city of New York received, not simply the political right to establish and regulate ferries, but the property in the ferry franchises from the "Island Manhattan's to any of the opposite shores all around the same island." The words "opposite shores" were not intended to limit the right granted to ferries from some point in the city to a point diametrically opposite, but the purpose was to secure to the city all the ferry franchises to and from it. *Mayor, etc. v. Starin.* 1
2. Accordingly *held*, that the grant included the ferry franchises and the exclusive right to control and receive the revenues of all ferries between the city and Staten Island. *Id.*
3. The rule requiring all gratuitous grants by the sovereign of exclusive privileges and franchises to be construed strictly, and that any ambiguity therein must operate against the grantee, is not in its strictness fully applicable to the grant of a ferry franchise. Such a grant is never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry, with suitable accommodations, for the convenience of the public. *Id.*
4. The rule also does not apply to the grants under said charter, as by the terms of the charter itself it is in all things to "be construed

* * * benignly and in favor of and for the most and greatest advantage, profit and benefit" of the city. *Id.*

5. While, if a practical construction by the parties interested, of ambiguous language in such a grant, as evidenced by their acts, has been uniform, it is entitled to great, if not controlling weight, if it has not been uniform, and such acts indicate conflicting views, they furnish no aid in arriving at the meaning. *Id.*
6. The omission of the city to assert its rights under the charter, or passive submission to the invasion thereof, *held* to have but little bearing in the construction of the grant; but that the acts of the city in asserting and exercising its rights from time to time, claiming the exclusive franchise, conclusively showed its understanding of its rights under the charter. *Id.*
7. *It seems* that the various statutes creating corporations to operate ferries between the city and Staten Island (Chap. 182, Laws of 1839; chap. 863, Laws of 1845; chap. 257, Laws of 1848), give no right to the corporations so organized to interfere with the franchises of the city, and before they could lawfully operate their ferries they were bound to acquire the right from the city. *Id.*
8. Also, *held*, that where lessees from the city were engaged in operating ferries between the city and Staten Island, it was no defense in an action against one operating such a ferry in violation of the rights of the city, that it had not lawfully established a ferry to said island or executed a legal lease; that a mere wrong-doer was not in a position to assail the action of the city, and could not appropriate its franchises because it had not in the management of them observed the provisions of its charter; and that it was sufficient to authorize a judgment restraining such an invasion of its rights for the city to show that ferries, adequate for the public conven-

lence, were in fact established and operated; and so, that its duties to the public as owner of the franchises had been discharged. *Id.*

9. Also, *held*, the fact that the defendant in such an action had a coasting license did not give it authority to invade the ferry franchises of the city. *Id.*

10. Also, *held*, that persons who had merely chartered steamboats to the company operating the unlawful ferry, to be used in the business, did not violate the rights of the city and were not proper parties to the action. *Id.*

11. Also, *held*, that others who were mere servants or agents of said company, while they might in the discretion of the court be joined as defendants, were not necessary parties, and that this court could not review a dismissal of the complaint as to them. *Id.*

12. Under the grant to the city of New York of ferry franchises by the Montgomerie charter, the city has authority to establish a ferry, to run from one place in the city to several places on Staten Island. *Mayor, etc. v. N. J. Stbt. Nav. Co.* 28

13. The city, however, in the discharge of its duty as the owner of said franchises, is not bound to have more than one terminus for its Staten Island ferries in this city, unless it is made to appear that more than one is needed for the accommodation of the public. *Id.*

14. In an action to restrain defendant, the N. J. S. T. Co., from infringing upon the ferry franchises belonging to the said city, between it and Staten Island, it appeared that defendant was engaged in carrying passengers to and from the city, its boats stopping in going and returning at several places on Staten Island and at two places in New Jersey, the round trip being about twenty-four miles. *Held*, that the business of defendant did not lose its character as a ferry business be-

cause its boats stopped on the New Jersey Shore; that while in the carriage of passengers from one place on the New Jersey shore or the Staten Island shore to another on the same shore, it was simply doing the business of a common carrier, as its boats did not pass over intervening waters; it was engaged in a ferry business between every point at which its boats touched for passengers and the city; that so far as it was thus operating a ferry between the city and Staten Island, it was unlawfully infringing upon the ferry franchises of the city; and that a judgment restraining such unlawful acts was proper. *Id.*

15. Also, *held*, the fact that the terminus of defendant's ferry in the city was at a private pier, seven eighths of a mile distant from the ferry terminus established by the city, did not affect the character of defendant's acts as an unlawful intrusion upon the rights of the city. *Id.*

16. The provision of general orders No. 13 of the board of commissioners of the fire department of the city of New York, series of 1881 (par. 5, § 8), which provides that every officer and member of the uniformed force of the department "shall be responsible for any want of judgment, skill * * * which may cause unnecessary loss of life, limb or property," refers to a loss which has actually resulted, not to one which might have happened. *People ex rel. v. Bd. Fire Comrs.* 257

17. Where, therefore, no actual loss has been occasioned by an act of a member of the force complained of, he cannot be held responsible under said provision. *Id.*

18. The jurisdiction of the fire department of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, includes structures on the wharves and piers owned by the city, as well as those owned by private individuals. (PECKHAM, J., dissenting.) *Fire Dept. v. Atlas S. S. Co.* 566

19. The jurisdiction given to the dock department over the wharves and piers belonging to the city, and the structures thereon, by the act of 1871 (§ 99, chap. 574, Laws of 1871), gives to that department exclusive charge and control, such as a private owner has of structures owned by him; it does not interfere with the building and fire law or the power of the officers having charge of the execution thereof. (PECKHAM, J., dissenting.) *Id.*

20. The history of legislation in relation to buildings and the prevention of fires in said city given. *Id.*

21. Whether the fire department acts independently as a distinct entity, with corporate powers, or as an agency of the city, it is not estopped from claiming against a lessee of one of the city wharves obedience to the building laws, and all orders and regulations lawfully made in pursuance thereof, by the fact that the lease contains provisions in contravention of those laws and orders. *Id.*

22. Accordingly *held*, in an action against a lessee of a pier belonging to the city, to recover the penalty imposed by the act of 1871 (§ 33, chap. 625, Laws of 1871), because of a violation of the requirements of a permit granted by the board of examiners for the erection of a structure on said pier, that plaintiff was not estopped by a provision in the lease authorizing the structure to be erected in a manner different from said requirements. *Id.*

23. The provision of the act of 1874 (§ 8, chap. 547, Laws of 1874) constituting the board of examiners, is not violative of the provision of the State Constitution (§ 2, art. 10), requiring all city officers, whose election or appointment is not provided for by the Constitution, to be elected by the electors of the city or appointed by the authorities thereof designated by the legislature for that purpose. The members of the board are not, as such, city officers. *Id.*

24. Even if they are to be considered city officers, as their offices were created subsequent to the adoption of the Constitution, they do not come within its purview. *Id.*

25. The determination of said board of examiners as to the mode of construction of a building, if their requirements are not wholly impracticable, even if they are unreasonable, may not be reviewed by the courts. *Id.*

NOTICE.

Where notice is served with the summons, that in case of default plaintiff will take judgment for a sum specified, this is his statement of the amount involved, and it is not for him to say on application for an extra allowance of costs that the notice is a nullity. *Adams v. Arkenburgh.* 615

OATH.

Where the assessor's oath, sworn to and attached to an assessment-roll, after the passage of the act of 1885, prescribing the form of such oath (Chap. 207, Laws of 1885), instead of following that form, was drawn in conformity to the statute in existence when that act was passed, and the roll so verified was delivered to the supervisor of the town, but before it had been in any way produced before or acted upon by the board of supervisors a new oath in proper form was attached to the roll. *Held*, that the verification was valid; that in this respect and to this extent the provision of the statute as to the time of verification is directory only. *People ex rel. v. Jones.* 330

PARENT AND CHILD.

1. To warrant an arrest under the section of the Penal Code (§ 291, subd. 2), directing the arrest of a female child "who has been abandoned or improperly exposed

or neglected by its parents or other person having it in charge," it must appear that the child was abandoned and neglected by the fault of her parents or custodians. *People ex rel. v. N. Y. C. Proctory.* 604

2. In proceedings on writs of *habeas corpus* and *certiorari* it appeared that a female child was committed to the custody of defendant for an assumed violation of said provision. The only evidence in the record of the proceedings before the justice was the complaint and the commitment; in the former she was charged with having been found "improperly exposed and neglected and wandering" in a public park "without any proper guardianship," and the commitment recited that the material allegations of the complaint were established. *Held*, that the complaint did not bring the case within the said provision, as it was not alleged that she was so exposed by those having her in charge. *Id.*

3. The information in such a case should be precise and bring it clearly within the statute; when it omits any essential ingredient or circumstance, and the defect is not supplied by the evidence, the conviction is bad. *Id.*

4. The complaint also charged "that the said child was found in the company of * * *, who is a reputed prostitute," in violation of the provisions of the Penal Code. The return to the writs simply averred its incorporation, and that, by virtue of defendant's charter and section 292 of the Penal Code, the child was committed to its custody under a commitment, a copy of which was annexed, which recited that the conviction proceeded upon proof of the charge made. The relator traversed the return, alleging, in substance, that the child had done no act prohibited by the Penal Code, but was in the park at the time charged for an innocent and lawful purpose, and having parents with whom she resided. Defendant demurred to this traverse. *Held*, that the com-

plaint followed substantially the language of the fourth subdivision of said section and was sufficient as matter of pleading; that the averments in the traverse admitted by the demurrer might show that the child was wrongfully convicted, but it could not be inferred therefrom that there was no evidence before the magistrate justifying the conviction, and that a retrial upon the merits could not be had in these proceedings. *Id.*

5. It was admitted that no notice of the proceedings before the magistrate was given to the father of the child, with whom she resided, and that he was not present at the examination. The relator, her mother, was present. *Held*, that by reason of the omission of notice to the father the magistrate proceeded without jurisdiction; also, the fact that the father is not the relator and does not make the application for the discharge did not affect the question. *Id.*

6. Under the provision of said section, as amended in 1886 (chap. 31, Laws of 1886), declaring that when it shall appear by the warrant of commitment that "the parent, guardian or custodian" was present at the examination before the magistrate or had such notice thereof as the magistrate shall deem sufficient, no further or other notice shall be necessary, where both parents are living the notice must be to, or the appearance by the father. *Id.*

7. The court below, on granting or affirming an order of discharge in such proceedings, has no authority to allow costs. *Id.*

PARKS.

Under the act of 1861 (chap. 340, Laws of 1861), providing for a public park for the city of Brooklyn, the city acquired a fee in the lands taken, impressed with a trust, of which the legislature could relieve the city. *City Bklyn v. Copeland.* 496

PARTIES

1. Persons who have merely chartered steamboats to a company operating an unlawful ferry in the city of New York, to be used in the business, do not violate the rights of the city, and are not proper parties to an action to restrain the operation of the ferry. *Mayor, etc. v. Starin.* 1
2. Others who are mere servants or agents of said company, while they may, in the discretion of the court, be joined as defendants, are not necessary parties, and this court may not review a dismissal of the complaint as to them. *Id.*
3. E., a married woman, died seized of a lot of land, the south-west line of which, as described in the deed under which she held, was near to high-water mark of the St. Lawrence river. The deed contained a reservation (so called therein) of all the grantor's rights "to the land now under water and to the water front beyond or south-west" of the south-west line of the lot conveyed. E. died intestate, leaving her husband and two infant children her surviving. In an action of ejectment, brought by the survivors, to recover the premises embraced in the reservation, the answer of the infants denied any entry by them upon or claim of title to any land except that of which their mother was seized at the time of her death, and no evidence was given tending to show possession of or assertion of title on their part to the premises in question; nor did it appear that their mother ever entered upon or claimed any right or interest in said premises. It did appear that after the death of E. her husband entered upon the said premises, erected structures thereon and tore down a wharf erected by plaintiffs. *Held*, that the infant defendants were improperly made parties; that their joinder as such was not justified by the Code of Civil Procedure (§ 1503), and the complaint should have been dismissed as to them; that they were not bound by the acts of their father, as these acts

- must be referred to his own interest and title as a life-tenant, not to the title of the remaindermen. *Sisson v. Cummings.* 56
4. Where a consignor of goods delivered to a common carrier for transportation, although not the general owner, has a lien upon or a special interest in the goods and makes the contract and pays the freight, he may bring an action for breach of contract in his own name. *Swift v. Pacific M. S. S. Co.* 206
5. Where, therefore, the owners of whaling vessels were the consignors and consignees of a quantity of oil and paid the freight thereon, *held*, the fact that the seamen on the vessels had an interest in the proceeds of the sale of the oil did not make them necessary parties to an action against the carrier for breach of contract. *Id.*
6. The real owner of mortgaged premises does not forfeit his right to be made a party to an action to foreclose the mortgage by an omission to record his deed; and, provided he make application in due time, it is the duty of the court to direct him to be brought in. (Code of Civ. Pro. § 452.) *Johnston v. Donvan.* 269
7. The members of a firm contracted for the purchase for the firm of certain real estate, the title was taken in the name of one of them for their joint benefit, the grantee giving back a mortgage for the purchase-money. *Held*, that the other two partners were entitled to be made parties defendant. *Id.*
8. *It seems* that the provisions of the Code of Civil Procedure (§§ 876, 873), in reference to the examination of a party to an action before trial, do not absolutely bind the judge to whom application is made for such an examination to grant an order, although the affidavit presented in form conforms to the requirements of said provisions. *Jenkins v. Putnam.* 273
9. Where, from the nature of the action and the other facts dia-

- closed, the judge can see that the examination is not necessary; that it is sought merely for annoyance or delay, he may, in his discretion, deny the application. *Id.*
10. Conceding the provision requiring the judge to make the order to be mandatory, it does not interfere with the power of the Supreme Court; it may, on motion, in the exercise of its discretion upon all the facts appearing, vacate the order and leave the party to take the examination on the trial. *Id.*
11. An order vacating an order for the examination of a party is not reviewable here, unless it appears from it that the decision was placed upon some ground of law not involving discretion. *Id.*
12. Where a charter-party is not under seal it is competent to prove, by evidence *aliunde*, that the charterers named therein, and who executed it, did so not only for themselves but also for others who were jointly interested with them as principals, and an action is maintainable thereon against all the parties so interested. *Woodhouse v. Duncan.* 527
13. In an action upon a charter-party it appeared that it was executed by defendants, D. & P., on behalf of themselves and the other defendants who were jointly interested with them as charterers. The answer set up, as a counter-claim, damages alleged to have resulted from a breach of an agreement in the charter-party on the part of plaintiffs. On the trial plaintiffs gave in evidence the judgment record in a suit in admiralty brought by D. & P. against the vessel and its owners to recover damages for the same alleged breach of contract. The record showed the libel was dismissed on the ground that the owners "had kept and performed all the covenants and undertakings in the said charter-party contained on their part." The answer alleged that three other persons were interested with defendants in the adventure and were necessary parties. It appeared that the three persons named had some interest, but it did not appear that plaintiffs knew of it at the time the charter-party was executed, nor was it proved that the interest was that of partners or joint contractors with defendants. *Held*, that the omission to make the three persons specified defendants was not a sufficient ground for reversal; that if at the time of making the contract the persons named were not known to plaintiffs to be joint contractors, it was not necessary to make them parties; that it was not sufficient to show that plaintiffs knew said persons had some interest in the adventure; it was requisite to prove knowledge that they were members of a firm, or joint contractors, with defendants. *Id.*
14. An action by an executor upon a claim, alleged to be due the estate, arising out of transactions between the testator and another, must be brought by the executor as such; it is not maintainable by him in his individual capacity. *Hone v. De Peyster.* 645
- *Assignee of covenant by a vendor of stock, good will, etc., of a business, that he will not engage in same business within certain bounds, may maintain action to restrain breach of covenant.*
Ses D. M. Co. v. Roeber. 473
- ### PARTITION.
1. The court has power to authorize a receiver appointed in a partition suit to lease the property, *pendente lite.* *Weeks v. Weeks.* 636
2. To justify the receiver in applying for authority to lease, and the court in granting the application, it is not necessary that the power to lease shall be given in the order appointing the receiver, or that said order give him liberty to apply for instructions. *Id.*
3. The court may authorize a lease for a term certain, the ordinary term of lease for such premises,

although it may extend beyond the termination of the litigation. *Id.*

4. *It seems* that a lease beyond the customary term, which might extend beyond the litigation, would be an unjustifiable exercise of judicial discretion. *Id.*

5. Absence of notice to the parties of the application by the receiver for leave to lease is not a jurisdictional defect, and does not invalidate the order or the lease executed under it. *Id.*

6. *It seems*, however, that notice should be required. *Id.*

7. Where a lease has been executed by the receiver under an *ex parte* order of the court, for a term extending beyond the close of the litigation, the court has power to modify or vacate the order, although the rights of the lessee may be affected thereby. *Id.*

8. In such case the court has power to award indemnity to the lessee as a condition of granting the motion to vacate or modify; and where the judgment directs a sale of the premises the court may direct the indemnity to be paid out of the fund arising on sale. *Id.*

9. In a partition suit a receiver was appointed, with authority to lease the premises for the term of three years. About six months prior to the expiration of the leases, executed in pursuance of such authority, and pending an appeal to the General Term from the judgment in the action, upon an *ex parte* application of the receiver and on affidavits showing that the litigation would not be terminated until long after the expiration of the leases, the court made an order authorizing the receiver to lease for a further term of three years, that being generally the shortest term for which such property could be advantageously rented; leases were executed accordingly. The litigation was, in fact, closed within a year after the commencement of the second terms. On motion of the parties the *ex parte* order was modified so as to author-

ize a leasing for but one year, and the lease were declared invalid except for that period. *Held*, that the court had jurisdiction to make the *ex parte* order, and the fact that the litigation terminated within the first year of the new term did not affect its validity; also, that the court had power to modify the order, but as the leases were valid when executed and the lessees acted in good faith in reliance upon the order, and as the parties had waited until final judgment before moving, with knowledge that the property was in the occupation of tenants after the expiration of the first leases, the tenants were entitled to indemnity. *Id.*

PARTNERSHIP.

The members of a firm contracted for the purchase for the firm of certain real estate, the title was taken in the name of one of them for their joint benefit, the grantee giving back a mortgage for the purchase-money. *Held*, that the other two partners were entitled to be made parties defendant; and that the questions as to whether a valid trust was created in their favor, or as to whether they were in a position to defend against the mortgage could not properly be determined on a motion to have them brought in as parties, but were questions to be litigated on trial of the action. *Johnson v. Dootan.* 209

PAYMENT.

1. Defendants chartered a vessel for a voyage from New York to Cadiz; they to pay to plaintiff a sum specified on delivery of the cargo at Cadiz, "in cash, without credit, discount or commission." Plaintiff performed the obligations of the charter-party on his part. Defendants' agent at Cadiz, who had funds in his hands to pay the freight, having been advised by plaintiff that he desired to remit a portion of the same stipulated to his principal, agreed to pur-

chase and remit a bill of exchange for the amount, and thereafter represented that he had so done, and defendants, relying upon such statement on payment of the balance, settled with the said agent, who had not, in fact, made the remittance as agreed, but instead thereof had drawn and transmitted his own draft on defendants, payable sixty days after sight for the amount, which draft defendants refused to accept or pay. Said agent had no authority to draw on defendants and had no funds in their hands. Plaintiff did not know that such draft was drawn until after he left the port of Cadiz and never agreed to accept it, but supposed the remittance was made as agreed. In an action to recover the amount of freight unpaid, *held*, that defendant was entitled to judgment; that although plaintiff assented to a mode of payment different from that stated in the charter-party, yet as the condition upon which the assent was given was not performed, it did not constitute in any sense a payment of defendants' debt. *Holdsworth v. De Belanzaran*. 119

2. *It seems* that if plaintiff had accepted the personal draft of the agent, or had extended to them a credit for the sum, in satisfaction of defendants' obligation, it would have operated as a discharge. *Id.*

PENAL CODE.

- §§ 291, 293, *People ex rel. v. N. Y. C. Protective*. 604
 § 538, *People v. Dumar*. 502

PENALTIES.

The provision of the General Manufacturing Act (§ 12, chap. 40, Laws of 1848), imposing a penalty upon trustees of a corporation organized under it for failure to file an annual report, is to be construed like other penal statutes; its scope may not be enlarged by construction or implication and the penalty may not be imposed except in

cases where the plain language of the provision requires it. *Whitaker v. Masterton*. 277

PHYSICIAN AND SURGEON.

See PRIVILEGED COMMUNICATIONS.

PIERS.

See WHARVES.

PLEADING.

1. As to all contracts relating to her separate estate, or made in the course of her separate business, a married woman stands at law on the same footing as if unmarried, and can, therefore, make, or authorize her husband as agent to make for her, negotiable paper which will be governed by the law merchant, and may be sued upon it in the ordinary way by general complaint without special averments. *Noel v. Kinney*. 74
2. In an action by a vendor of real estate to enforce his lien for purchase-money, as against a mortgage executed by the vendee, it is not necessary for the plaintiff to allege in his complaint that he has not waived his lien or that the defendant took with notice; waiver or want of notice must be set up in the answer and proved as a defense. *Seymour v. McKinstry*. 230
8. Where a claim can be sustained only upon the ground that the person asserting it is an innocent purchaser, he must positively deny notice of the equitable rights of another, although it be not charged. *Id.*
4. Plaintiff's complaint herein alleged, in substance, that, under the provisions of said act, it became and still is the owner in fee and possessed of certain land described in the complaint; that under a statute authorizing it (Chap. 373, Laws of 1870, as amended by chapter 795, Laws of

1878), a sale of said land was made to defendant and he entered into a contract to purchase, but that he has refused to take title or pay the purchase-money. Plaintiff asked for a specific performance. The answer admitted each and every allegation of the complaint, except it denied that the statutes mentioned were competent to vest in plaintiff the ownership of the land in question. *Held*, that the allegation of ownership in the complaint was equivalent to an averment of compliance with the terms of the act of 1861, *i. e.*, that the commissioner's report was confirmed and payment made to the owners of the land or their assent obtained by deed duly executed; that this averment was not denied by the answer, which simply put in issue the quantum of the estate acquired by the city; and as, if true such averment would preclude the owners from thereafter questioning the validity of the act, its constitutionality could not be questioned here. *City of Brooklyn v. Copeland.* 496

PLEDGE.

1. Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid. *Moors v. Kidder.* 32
2. S. and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B. & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co., and by invoice to their order. S. agreed to provide funds in Lon-

don to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, were thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B. & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. *Held*, that B. Bros. & Co. were owners of the property. *Id.*

3. In the ordinary course of business the shellac was brought to the custom-house and into the "general order" stores. On application of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom-house and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff as security for a loan, the latter relying upon the representations of S. and the warehouse receipt. *Held*, that plaintiff acquired no title to the property; and that an action to recover possession thereof was not maintainable. *Id.*

POOR.

—*Effect of order allowing infant plaintiff to prosecute as a poor person. See Shearman v. Pope. (Mem.) 664*

PRACTICE.

1. Under the provision of the Code of Civil Procedure in reference to a hearing upon return to a writ of *certiorari* (§ 2188), which pro-

- vides that the hearing must be had "upon the writ and return and the papers upon which the writ was granted" where the return admits the facts stated in the writ, or the papers upon which it was granted, or is silent as to them, such facts must be considered and have effect upon the hearing. *People ex rel. v. Com'rs Dept. P. & B.* 64
2. *It seems* where the return meets all the allegations of fact contained in the writ and the papers upon which it was granted and traverses them, the hearing must be confined to the facts stated in the return. *Id.*
3. A bill of particulars, like a pleading, may be amended. *Case v. Pharis.* 114
4. A plaintiff is not bound to furnish a statement of payments or off-sets which he has voluntarily credited, and where he has done so in such a manner as by mistake to have periled his right or made ambiguous his meaning, the allowance of an amendment striking out the statement is proper. *Id.*
5. The members of a firm contracted for the purchase for the firm of certain real estate, the title was taken in the name of one of them for their joint benefit, the grantee giving back a mortgage for the purchase-money. *Held*, that the other two partners were entitled to be made parties defendant; and that the questions as to whether a valid trust was created in their favor, or as to whether they were in a position to defend against the mortgage could not properly be determined on a motion to have them brought in as parties, but were questions to be litigated on trial of the action. *Johnston v. Donnan.* 269
6. Where, in an action to restrain the alleged unlawful use and occupancy of plaintiff's premises, he bases his right to recover in his complaint and upon the trial exclusively upon his legal title to the land and the invasion of his right, as owner, he may not sustain a judgment in his favor on appeal on the ground that the *locus in quo* is a public highway in which he has rights as abutting owner which have been infringed upon by defendant. *Vail v. L. I. R. R. Co.* 283
7. The motion papers, on motion for reargument, should be sufficient to enable the court to determine whether the decision requires correction in any respect. *Anderson v. Cont'l Ins. Co.* 661
8. Where a case was decided here on a dissenting opinion in the court below, *held*, that on motion for reargument for alleged errors in that opinion the case on appeal containing the opinion should have been furnished. *Id.*

PRESUMPTIONS.

1. Although it appears by the opinion of the General Term that a judgment in an action tried by the court was reversed upon the facts; yet, if this does not appear in the order of reversal, this court is bound to presume that the reversal was upon questions of law only. *Lewis v. Barton.* 70
2. Where actual shipment has been made by a common carrier, the presumption is that the property delivered corresponds with that described in the bill of lading; and where a bill is issued without the delivery of the property, the carrier cannot defend against the wrong by presuming if it had not occurred another would have taken its place. *Bk. Batavia v. N. Y., L. E. & W. R. R. Co.* 195

PRINCIPAL AND AGENT.

1. Where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from

denying the existence of the fact to the prejudice of a third person who has dealt with the agent in good faith in reliance upon the representation. *Bk of Batavia v. N. Y., L. E. & W. R. R. Co.* 195

2. This rule applies as well where a corporation as where an individual is the principal. *Id.*

3. A carrier corporation, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill has in, good faith, discounted a draft drawn upon the consignee, although no property was in fact delivered. *Id.*

4. No privity is necessary in such a case to make the estoppel available other than that which flows from the wrongful act of the agent and the consequent injury. *Id.*

5. An agent of an insurance company, who, with the knowledge of the company, had been in the habit of filling in applications for insurance, wrote in an application that the building on which insurance was desired was occupied as a residence by a tenant. The statement made by the applicant was that the building was unoccupied, but when occupied it was by a tenant. The applicant, supposing his statement to have been written in correctly, signed the application without noticing the misstatement. The policy contained a provision to the effect that if the building insured should cease to be occupied as a dwelling "or be so unoccupied at the time of effecting insurance and not so stated in the application," the policy shall be null and void "until the written consent of the company is obtained." In an action upon the policy, *held*, that the error of the agent could not be imputed to defendant; that the misstatement was, as between the parties, that of the agent, not of the plaintiff, and the fact of non-occupation

must be deemed to have been stated in the application, and so it did not constitute a breach of warranty. *Bennett v. Agricultural Ins. Co.* 243

6. Whenever the act of an agent is apparently authorized by the terms of his power, and is not, so far as a third person dealing with the agent can know, in excess of his authority, the act is presumptively within the authority, and the burden of proving that it was done after the authority was spent rests upon the principal. The burden is not met or the presumption overthrown by proof that in the course of the agent's dealings he fraudulently exceeded his authority; it must be shown that the particular transaction was unauthorized. *Parker v. Board of Suprs.* 393

7. Whether the rule that the principal may be bound by a false representation by an agent of the existence of an extrinsic fact peculiarly within the agent's knowledge, upon the existence of which his power depends, applies to public agents, *quere*. *Id.*

See FACTOR.

PRINCIPAL AND SURETY.

1. Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgaged debt, and the remainder is liable as security merely. *Wilcox v. Campbell.* 325

2. The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt. *Id.*

3. This obligation on the part of the purchaser is not affected by its conveyance, and if the said purchaser fails to protect the residue from sale under the mortgage

he becomes liable to the grantee thereof for the damages thus caused to him. *Id.*

4. The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and if he fails so to do and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Id.*

5. The rule which requires a party exposed to injury or damage to make the loss as small as he reasonably can, does not require the grantee of the remainder to advance the money to pay the mortgage for the purpose of protecting himself and his land. *Id.*

PRIVILEGED COMMUNICATIONS.

1. Where a party seeks to exclude the testimony of a physician under the provision of the Code of Civil Procedure (§ 834), forbidding a physician from disclosing information he "acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity," the burden is upon such party to bring the case within the provision; he must make it appear not only that the information which he seeks to exclude was acquired by the witness in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity. *People v. Schuyler*. 298

2. Upon the trial of an indictment for murder, where the defense was insanity, the prosecution called as a witness B., who was a physician of the jail where defendant was confined for six months prior to the trial. B. testified that he was employed by the board of supervisors, and as such had medical charge of all prisoners in the jail; that he examined defendant at the request of both parties, and "kept an eye

on the case;" that he saw to the defendant, as he did to others, when he needed it. There was no proof that defendant was, at any time, sick during the six months, or that the witness was ever called to attend upon or prescribe for him as a physician. A hypothetical question was then put to the witness, from which was excluded all personal knowledge he had of the defendant, but which was based entirely on facts which occurred before defendant came to the jail, and the witness was requested to answer, without any reference to anything except to the facts stated as to whether the defendant was sane or insane when he committed the act. The witness stated that it was very questionable whether, in answering, he could, and he was unwilling to say that he could, exclude the knowledge he had obtained while defendant was in jail. The question was objected to as incompetent under said provision and the witness allowed to answer. He answered "sane." *Held* (RAPALLO and ANDREWS, JJ., dissenting), that the evidence was competent; that even if the witness was influenced by the knowledge he acquired by seeing the defendant in jail, this did render his testimony incompetent. *Id.*

3. On cross-examination the witness stated he thought it was a practical impossibility to eliminate from his own mind the convictions formed as the physician of the prisoner and thus answer the question. On being reminded that he had answered, he stated that he withdrew the answer and did not wish it to be treated as an answer. The district attorney objected; the court held it had not the power to strike out the answer and refused so to do. *Held* (RAPALLO and ANDREWS, JJ., dissenting) that as the witness was not bound to eliminate the knowledge he acquired as jail physician, if he could not, it did not render the answer incompetent; and so it was not error to refuse to strike it out. *Id.*

4. After the statements of the wit-

ness as to his knowledge of the prisoner, and before the hypothetical question was put, the court stated that the witness could not give any testimony based upon any fact that he learned either from or in regard to defendant, at any time when the relation of patient and physician existed. *Held*, that the erroneous assumption by the court that the mere fact that the witness was the jail physician created the relation of patient and physician between him and defendant, did not render the question incompetent; that an erroneous ruling in defendant's favor could not render incompetent evidence which, in its nature, was competent. *Id.*

5. As to whether the said provision renders a physician incompetent to testify that his patient was free from disease of any kind, *quære*. *Id.*

6. Also, *quære*, as to whether, when the patient calls witnesses to testify as to his mental condition, he does not waive his privilege under the provision and throw open the inquiry. *Id.*

QUESTIONS OF LAW AND FACT.

Although it appears by the opinion of the General Term that a judgment in an action tried by the court was reversed upon the facts; yet if this does not appear in the order of reversal this court is bound to presume that the reversal was upon questions of law only. *Lewis v. Barton.* 70

— *When question of negligence one of law.*

See Laffin v. B. & S. R. R. Co. 136

— *When negligence, question of fact.*

See Woodard v. N. Y., L. E. & W. R. R. Co. 869

— *Where order of General Term, reversing judgment in action, tried by court does not state reversal was upon the facts, justification for the reversal*

must be found in some error of law.

See Frouser v. F. N. Bank. (Mem.) 677

RAILROAD COMMISSIONERS.

See BOARD OF RAILROAD COMMISSIONERS.

RAILROAD CORPORATIONS.

1. The provisions of the railroad act of 1869 (§ 4, Chap. 907, Laws of 1869), directing and providing for the application of taxes assessed upon any railroad in a town, city or village, toward the redemption of bonds issued by the municipality to aid in the construction of such railroad, are not in conflict with any constitutional provision. *In re Clark v. Sheldon.* 104

2. They do not impose a tax upon property in other portions of the county for the benefit of the town, city or village; they simply deprive such other portions of the benefit derived from the taxation of railroad property in the municipality. *Id.*

3. They are not violative of the provision of the State Constitution (§ 8, art. 7), prohibiting the payment out of the treasury of the State of any moneys, except in pursuance of an appropriation, etc.; as the fund realized from such taxation does not belong to the State or go into its treasury. *Id.*

4. They are not repugnant to the constitutional provision (§ 20, art. 8), declaring that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied; the said provision simply specifies what may be done with a tax which has been legally imposed. *Id.*

5. Said statutory provisions include all taxes of every description save those excepted therein, *i. e.*, school and road taxes, and so include

- town, village, city, county and State taxes. *Id.*
6. It is not requisite that the taxes so to be appropriated should be specially levied; they are to be levied in the same way as other taxes. *Id.*
7. The said provisions are applicable to any municipality having bonds outstanding issued in aid of the construction of any railroad; and they are not limited to railroads constructed under said act of 1809. *Id.*
8. Plaintiff, a passenger on defendant's road, in attempting to step from the car to the station platform missed the platform, fell between it and the car and was injured. In an action to recover damages for the injuries the following facts appeared: The distance between the platform and the car was eleven inches. The lower step of the car was eight inches below the top of the platform, and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from the second step without having hold of the iron railing on either side and without looking to see the station platform. The platform had been used for many years by passengers, and prior to the accident no one had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order or improperly constructed. *Held*, the facts did not justify a verdict for plaintiff; and that a refusal to direct a verdict for defendant was error. *Lafflin v. B. & S. W. R. R. Co.* 136
9. As a general rule where an appliance, machine or structure, not obviously dangerous, has been in daily use for years and has uniformly proved adequate, safe and convenient, it may be continued without the imputation of negligence. *Id.*
10. It is not the duty of a railroad company to furnish some one to aid passengers in alighting from its cars. *Id.*
11. In an action to recover damages for an alleged interference with plaintiff's rights in a street; the alleged interference was by the construction upon the street and operation of an elevated railroad. *Held*, that evidence was competent that since the building of the railroad the trade and business of the street had fallen off and the amount of custom greatly diminished in volume and changed in character; that to measure and appreciate the individual loss to plaintiff the nature and extent of the general injury were properly and necessarily considered. *Drucker v. Manhattan R. Co.* 157
12. The evidence tended to show that by reason of the falling off of business rental values on the street had seriously diminished; but it was also established that the result was due in part to a tendency of business to move "up town." *Held*, that although it could not be ascertained with definiteness and precision what proportion of the loss was caused by the wrongful acts of defendant, and the problem of damages could only be solved by taking into view the general loss and estimating out of it the part or share chargeable to defendant, this did not prevent a recovery; that when all reasonable facts and data had been furnished for consideration it was no defense to a wrong-doer that the judgment against him must involve more or less of estimate and opinion. *Id.*
13. Also, *held*, it was proper to prove and to take into consideration as elements of damages the impairment of plaintiff's easement of air, caused by smoke, gases, ashes and cinders from passing trains, the lessening of the easement of light, caused by the elevated road itself and the passage of trains, and the

interference with convenience of access, caused by the drippings of oil and water. *Id.*

14. One of defendant's local freight agents, having authority to receive and forward freight and to give bills of lading, specifying the terms of shipment, but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to one W., describing them as received to be forwarded to C., as consignee, but adding, with reference to the packages, "contents unknown." W. drew a draft on the consignee which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were, in fact shipped by W., or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused. In an action upon the bills of lading, *held*, that defendant was liable; and that the recital in the bills that the contents of the packages were unknown was no defense. *Bk. Batavia v. N. Y., L. E. & W. R. R. Co.* 195

15. The provision of the act creating the Board of Railroad Commissioners (§ 13, chap. 353, Laws of 1882), providing that the salaries and expenses of the board shall be borne by the railroad companies by assessing upon each "its just proportion, * * * one-half in proportion to the length of main track or tracks on road," means the length of the road, including its branches and auxiliary lines, if any, not the aggregate length of all its tracks where it has two or more parallel tracks between two terminal points. *People ex rel. v. Uhapin.* 265

16. In an action to recover damages for alleged negligence on the part of defendant causing the death of W., plaintiff's intestate, it appeared that W. was struck by one of defendant's cars and killed at a street crossing in the village of H. Six tracks cross the street at

this point. W. approached the crossing along the street on foot from the north, the line of the street and of the rails as they approach, the former from the north, the latter from the west, make quite an acute angle. The first track is a switch, and the car which struck W. was not attached to any engine, but was pushed or "kicked" down from the west on said track; it was moving by its own momentum at a rate of not over four miles an hour. The accident occurred in the middle of a bright, clear day. Up to a point on the street thirty-one and a half feet northerly from the crossing the switch could not be seen, as a building obstructed the view, but at that point it could be seen to the west for a distance of fifty-seven feet from the crossing. When within ten feet of the track it could be seen one-hundred and thirty-seven feet. The switch was used for the delivery of coal for the village, and the cars containing coal were habitually shunted down the switch to the place of delivery. W. was employed in a coal yard near the crossing and was perfectly familiar with the crossing and the use made of the switch. *Held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that the facts made it absolutely certain either that W. looked and, seeing the car coming, undertook to cross in front of it, or did not look when it was his duty, and was, therefore, chargeable with contributory negligence; and that a submission of the question to the jury was error. *Woodard v. N. Y., L. E. & W. R. R. Co.* 369

17. Also *held*, the fact that trains were moving past the crossing on the other tracks, south of the switch, did not authorize an inference that the decedent's attention was so diverted as to excuse his omission to look and see if the track was clear. *Id.*

18. A court of equity, having possession in a foreclosure suit of the property of a railroad company, has jurisdiction to authorize the creation of debts for rolling

stock and other purposes, when, in its opinion, it is necessary so to do to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property. *Vilas v. Page.* 439

19. The court is not divested of its power and duty of managing the property by reason of a sale which the purchasers delay or neglect for many years to complete. *Id.*

20. In an action to recover damages for alleged negligence, it appeared that plaintiff was a passenger in a train on defendant's road, and as the train approached his destination he arose from his seat and went to the end of the car to get some baggage. On his return he tripped and fell over a board which a brakeman had placed across the aisle from one seat to the one opposite and was injured. The brakeman was called as a witness for the defendant and testified that he was standing or about to get up on the board when plaintiff came up and asked to be permitted to pass; the witness, in doing this, cautioned him to be careful about or look out for the board. On cross-examination said witness was asked if he did not state to plaintiff, on the train, that he had forgotten to remove or slide back the board and that it was his fault, that he was careless. This was objected to; objection overruled and witness answered, denying any such conversation; and he denied having any conversation with plaintiff after the accident. Plaintiff was subsequently recalled, and, after testifying that he did have a conversation with the brakeman, was asked to state it. This was objected to; objection overruled and exception taken. Plaintiff in giving the conversation did not testify that the brakeman stated it was his fault, but on being directed by the court to repeat the conversation included that statement. *Held*, that the reception of the evidence was error; that it did not legitimately tend to impeach or contradict the direct testimony of the brakeman; also,

the fact that the declaration was called out by the court, not in response to the question of plaintiff's counsel, and that no motion was made to strike it out did not deprive defendant of the benefit of the exception; that as the court had already ruled that the conversation was proper it was not necessary to repeat the objection. *Sherman v. D., L. & W. R. R. Co.* 542

21. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, as a passenger on the road of the N. Y. & N. E. R. R. Co., came into the depot at Hartford, Conn., which depot was built and used in common by that company and the defendant. There were exits from the depot on the east and west sides. Plaintiff, who had never before been in Hartford, followed a number of other passengers out of the depot on to a platform running along its east side. One of the defendant's tracks ran outside of the depot, along near the platform, so close that its cars moving thereon overlapped the platform two or three inches and more according to the oscillations of the car. Cabmen were standing about ten feet from the platform, one of whom approached plaintiff and was engaged by him. He took part of plaintiff's baggage and proceeded to his cab a few feet distant, leaving plaintiff on the platform, when one of defendant's trains, moving at an unusually rapid rate upon the track, over which the cabman had just passed, struck plaintiff and inflicted the injury. It was a dark, hazy evening. Plaintiff did not know of the existence of the track and did not see it. Both he and the cabman testified that they did not see the train or know of its approach and heard no bell or whistle. *Held*, that the evidence justified a submission of the case to the jury and was sufficient to sustain a verdict for plaintiff; that he was entitled to a safe passage out of the depot, and had a right to act upon the assumption that every necessary

and reasonable precaution would be taken to make it safe; that he had a right to regard the platform as a safe and proper place; and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of outgoing and incoming passengers, and so near a platform provided for them as to sweep a portion of it, was negligence. *Archer v. N. Y., N. H. & H. R. R. Co.* 583

22. Defendant is a Connecticut corporation. Plaintiff was permitted on the trial, against defendant's exception, to read in evidence portions of the statutes of that State relating to the running of railroad trains, and the court refused to charge the jury that they were not to be influenced by said provisions. *Held*, no error. *Id.*

23. Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident, and testified that it represented fairly the locality. On cross-examination he testified that he did not take it and did not know from what point it was taken. The reception of the photograph was objected to generally and objection overruled. *Held*, no error; that the photograph, if a fair representation, was admissible the same as a map or other diagram. *Id.*

24. In an action against a railroad company to recover damages for an injury to a passenger caused by the falling upon him of an article placed in a rack over his seat by another passenger, *held*, that in looking for and protecting passengers from such dangers, a carrier was not required to exercise the highest care which human vigilance can give, but only reasonable care, to be measured by the circumstances surrounding each case. *Morris v. N. Y. C. & H. R. R. Co.* 678

REARGUMENT.

1. The motion papers, on motion for reargument, should be sufficient

to enable the court to determine whether the decision requires correction in any respect. *Anderson v. Continental Ins. Co.* 661

2. Where a case was decided here on a dissenting opinion in the court below, *held*, that on motion for reargument for alleged errors in that opinion the case on appeal containing the opinion should have been furnished. *Id.*

RECEIVER.

1. The R. B. I. Co. was organized for the purpose of erecting and managing a hotel. It purchased lands subject to a mortgage, and to raise funds to build the hotel sold and hypothecated its bonds secured by a trust mortgage on the hotel property. Having exhausted all of its available means, and being indebted to a large amount for labor, materials, etc., before the completion of the building, in an action brought by a stockholder to dissolve the corporation a receiver was appointed, who by an *ex parte* order in said action was authorized to borrow on his certificates \$130,000 for the "purpose of paying the employees of said company," which certificates were declared by the order to be a first lien, prior to the trust mortgage. Neither the trustee nor the bondholders were then parties to the action, and they had no notice of the application for the order. Under said order \$110,000 of certificates were issued by the receiver. On foreclosure of the original mortgage a surplus arose, and in proceedings to determine the priority of claims thereto, *held*, the fact the company was owing debts for labor created no equity for their payment in preference to the bondholders; and that so much of the order as made the certificates prior liens was void. *Raht v. Attrill.* 423

2. In the surplus money proceedings the order was sought to be sustained on the ground that when it was granted a large number of laborers whose wages were in

arrears were absolutely destitute, had become riotous, and threatened, unless paid, to burn the hotel building, and the referee found that but for the advancement of money on the certificates, which enabled the receiver to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have been destroyed or seriously injured." *Held*, that this did not justify the order; that the debt so created by the receiver was not one for preservation; that it could not be assumed that the ordinary agencies of the law were insufficient to furnish the requisite protection. *Id.*

8. In an action to foreclose two railroad mortgages, V., one of the defendants, answered, setting up a title to certain of the rolling stock under a levy and sale on execution against the railroad corporation; he claiming that, as against him, the mortgages were void as to personality, because not filed as chattel mortgages. An interlocutory judgment was rendered in February, 1857, adjudging that the mortgaged property, other than that claimed by V. be sold, and referring the issues presented by his answer. Upon sale made in September, 1857, under the said judgment, the property was bid off by a committee representing the first mortgage bondholders; but a small amount, if any, of the sum bid was paid down. In March, 1858, upon petition of the receiver appointed in the action, and on affidavit of the plaintiffs' attorney, an order was granted which authorized the receiver to expend a sum not exceeding \$27,500 in the purchase of necessary rolling stock for the road, on a credit, provided the purchase should be approved by plaintiffs or their attorney, and directing that sufficient of the purchase-money of the mortgaged premises be applied to pay the sum the receiver might contract to pay for the said rolling stock; which sum the order declared was thereby made "a first lien on the said mortgaged property and all proceeds thereof which may come

into" the court. In August, 1858, the receiver entered into a contract with V., which was approved by the plaintiffs' attorneys, by which V. released to the receiver the said rolling stock, and it was agreed that, in case it should be finally determined that said property belonged "absolutely and beneficially" to V. he should be paid \$18,000 for the release, and that the same should be a first lien upon the mortgaged property. The receiver continued in possession of the mortgaged property, operating the road apparently in the interest of the purchasers, and using the property purchased of V. until 1868. In August of that year the sale under the interlocutory judgment was completed by a conveyance to the purchasers, in which the property claimed by V. was excepted, but the receiver executed a transfer of his title and interest and turned over said property to a new corporation organized by the purchasers to take the title and to operate the road; and it was thereafter used on the road. The consideration for the conveyance was paid almost wholly by the surrender of bonds. The claim of V. was, by the final judgment in the foreclosure suit, determined in his favor, subject to the right of redemption, if any existed. In an action by V. to enforce an alleged lien upon the road given by the agreement with the receiver of August, 1858, *held*, that the order of March, 1858, was valid and binding upon the parties to the foreclosure suit and upon the bondholders, the purchasers on the foreclosure sale; as, when it was made, title had not passed under said sale; that said purchasers by their conduct and delay acquiesced in the operation and management of the road by the receiver in the usual way; that the lien authorized by said order was not simply upon the proceeds of the sale, but upon the *corpus* of the property, and, as there were no such proceeds to which the lien could attach or be transferred, it remained attached to the property and followed it into the hands of the purchasers

and all subsequent assignees chargeable with notice thereof; that the agreement with V. was authorized by said order; that the determination referred to therein was of the issue raised in the foreclosure suit, and its decision in his favor entitled him to payment of the stipulated price and to a lien therefor on the mortgaged property. *Vilas v. Page.* 430

4. In September, 1867, the holders of the first mortgage bonds entered into a contract with P. and others for the purpose of organizing a new corporation, by which they transferred said bonds to P. and his associates, and agreed to organize the new company, and that it should acquire title to all the property of its predecessor, subject to the claim of V., "if any shall finally be adjudged;" and to pay any floating debts incurred by the receiver "which constitute any lien upon the railroad." The purchasers agreed to assume and prosecute the litigation against V., and in case of any recovery in his favor to indemnify the sellers and the receiver against the same. *Held*, that said agreement imposed no personal liability upon P. and his associates to V.; and that a personal judgment in his favor against them was unauthorized. *Id.*

5. Also, *held*, that the costs adjudged in favor of V. in the foreclosure suit were not included in his agreement with the receiver and could not be charged as a lien upon the property. *Id.*

6. Before the dissolution of the defendant by the judgment in this action and the appointment of a receiver of its property, a judgment had been recovered against it in a United States Circuit Court upon a policy of insurance theretofore issued by it. Defendant had taken the case, by writ of error, to the United States Supreme Court for review, had given a bond with sureties, and had given as indemnity to the latter a mortgage upon certain of its property and an assignment of a mortgage. The receiver, on application to the

court which appointed him, was directed to employ counsel to argue the cause on hearing of the writ of error. The judgment was reversed and a new trial granted. Subsequently the plaintiffs in that action took judgment by default. The receiver was never made a party thereto and took no part in the conduct of the defense. Said judgment was presented as the basis of a claim to a share in the funds of the dissolved corporation in the hands of the receiver, and it was claimed that the receiver was concluded thereby. *Held*, that as to the defendant of record, its dissolution put an end to the action, and at the time of the rendition of the judgment it had no property against which a judgment could be enforced; that the receiver could not be affected by said judgment unless he had by some action, under the direction of the court appointing him, made himself responsible for the final result; that his intervention in the United States Supreme Court did not make him so responsible, as it was simply for the purpose of protecting the assets in his hands from an incumbrance which had no connection with the subject-matter of the litigation, and the reversal of the judgment ended his connection with the action, and the parties litigant were thereby restored to the same position in which they were prior to its rendition; that the United States Circuit Court acquired no jurisdiction over him or over the funds sought to be reached by its adjudication; and that therefore, the receiver was not estopped by the judgment. *People v. Knick. L. Ins. Co.* 619

7. The court has power to authorize a receiver appointed in a partition suit to lease the property, *pendente lite.* *Weeks v. Weeks.* 620

8. To justify the receiver in applying for authority to lease, and the court in granting the application, it is not necessary that the power to lease shall be given in the order appointing the receiver, or that said order give him liberty to apply for instructions. *Id.*

9. The court may authorize a lease for a term certain, the ordinary term of lease for such premises, although it may extend beyond the termination of the litigation.

Id.

10. *It seems* that a lease beyond the customary term, which might extend beyond the litigation, would be an unjustifiable exercise of judicial discretion.

Id.

11. Absence of notice to the parties of the application by the receiver for leave to lease is not a jurisdictional defect, and does not invalidate the order or the lease executed under it.

Id.

12. *It seems*, however, that notice should be required.

Id.

13. Where a lease has been executed by the receiver under an *ex parte* order of the court, for a term extending beyond the close of the litigation, the court has power to modify or vacate the order, although the rights of the lessee may be affected thereby.

Id.

14. In such case the court has power to award indemnity to the lessee as a condition of granting the motion to vacate or modify; and where the judgment directs a sale of the premises the court may direct the indemnity to be paid out of the fund arising on sale.

Id.

15. In a partition suit a receiver was appointed, with authority to lease the premises for the term of three years. About six months prior to the expiration of the leases, executed in pursuance of such authority, and pending an appeal to the General Term from the judgment in the action, upon an *ex parte* application of the receiver and on affidavits showing that the litigation would not be terminated until long after the expiration of the leases, the court made an order authorizing the receiver to lease for a further term of three years, that being generally the shortest term for which such property could be advantageously rented; leases were executed accordingly.

The litigation was, in fact, closed within a year after the commencement of the second terms. On motion of the parties the *ex parte* order was modified so as to authorize a leasing for but one year, and the leases were declared invalid except for that period. *Held*, that the court had jurisdiction to make the *ex parte* order, and the fact that the litigation terminated within the first year of the new term did not affect its validity; also, that the court had power to modify the order, but as the leases were valid when executed and the lessees acted in good faith in reliance upon the order, and as the parties had waited until final judgment before moving, with knowledge that the property was in the occupation of tenants after the expiration of the first leases, the tenants were entitled to indemnity.

Id.

16. In January, 1883, M. made an assignment for the benefit of creditors. Among the property assigned were certain stereotype and electrotype plates then in the possession of L. & D., as custodians for M., upon which was a chattel mortgage, which was not filed until the day of the execution of the assignment. In March, 1883, L. & D. recovered a judgment against M. for a debt accruing prior to January, and attempted to levy upon the plates by virtue of an execution issued thereon. By an order made in this action, the assignee was removed and a receiver, *pendente lite*, of the assigned property appointed. In proceedings instituted by the receiver against L. & D., who had refused to deliver up the plates, it was adjudged that said firm had no lien, and that the receiver was entitled to possession. The plates were thereupon, and previous to July, 1883, delivered to the receiver. In March, 1884, the receiver applied *ex parte* for directions as to the disposition of the property, and an order was thereupon made directing a sale of the plates and payment of the mortgage debt out of the proceeds; this the receiver did. In November, 1884, L. & D. petitioned to have

the *ex parte* order vacated so far as it directs the payment of the mortgage. *Held*, that the petition was properly denied; that as, at the time of the sale, L. & D. had no lien upon the property, their remedy, if any, was to obtain an order of the court directing as to the disposition of the proceeds, and until this was done it was the duty of the receiver to proceed under the order of the court; that when the mortgage became payable the mortgagee, in the absence of fraud, became entitled, as against the mortgagor and his representatives, and all other persons who had not acquired liens, to demand, receive and sell the mortgaged property; that after waiting a reasonable time to enable the petitioners to take steps, if they desired, to establish a right to the property, it was the duty of the receiver to apply for and take the directions of the court, and he was under no obligation to give notice to the general creditors; and that the petitioners having laid still from July, 1883, to November 1, 1884, without taking any steps or giving any notice of an intention to assert an interest in the property, if they had any equitable interest (as to which *quære*), they had lost it by their laches. *Sullivan v. Miller.* 685

17. The principles governing an accounting by an assignee under a general assignment control in such a case, and relieve the receiver from any liability for payments and disbursements made in good faith in the execution of the duties of his receivership. *Id.*

RELIGIOUS CORPORATIONS.

1. Where a conveyance of land to a religious corporation is absolute, without condition or reservation, it creates no trust beyond the duty imposed by law upon the corporation of using its property for the purposes contemplated in its creation. Such a trust is not fastened upon the land, but the corporation may, with the judicial consent, sell and convey a good title, the

proceeds in such case taking the place of the land. *In re First Presbyterian Society.* 251

2. As to whether, under the acts of 1875 and 1876 (Chap. 79, Laws of 1875 and chap. 110, Laws of 1876), and under the "rules and usages" of the Presbyterian church of the United States, a church belonging to that denomination can sell its real estate without the precedent consent of the Presbytery, *quære.* *Id.*
8. The Presbytery gave its consent to such a sale, provided it was "authorized by a vote of the congregation in public meeting assembled." The trustees of the church regularly called a meeting, at which, of one hundred and thirty-seven members entitled to vote, eighty-seven voted, and of these sixty-six voted in favor of a sale; twenty-four of those who did not vote signed a paper approving a sale. *Held*, that, conceding the consent of the Presbytery was necessary, the condition imposed by it was complied with and the sale was authorized. *Id.*
4. Also, *held*, in the absence of proof that any lawful vote was excluded or unlawful one admitted, the want of a proper register did not invalidate the vote taken. *Id.*
5. This court has no authority to review the determination of the court below as to the propriety of such a sale. *Id.*

REMEDIES.

A remedy given by the statutes of another State to creditors of a corporation against its stockholders is not available here. *Christensen v. Eno.* 97

See ELECTION OF REMEDIES.

REVERSION.

1. F., for the purpose of making provision for the support of his wife and children, entered into a

tripartite agreement with her and J., as trustee, whereby he conveyed to J. certain land, in trust, to sell and convey the same, invest the proceeds and pay the income to her during her life. Subsequently the same parties entered into another agreement, which recited that F. desired to make still further provision for his wife and children, and for that purpose, on condition that the wife should perform certain covenants therein contained on her part, he agreed to quit-claim to J. "all his right, title and interest to and in" said land, and to pay J. \$300 a year for the support and education of each of two of said children until they, respectively, became of age; the deed and bill of sale to be put in *escrow*, to be delivered and to become operative and in full force and effect when the covenants on the part of the wife were performed, but to be returned to F. if not so performed. A quit-claim deed was executed by F. as agreed. J. thereafter sold the land and with a portion of the proceeds purchased a house and lot, which, by the terms of the deed, were conveyed to him, "as trustee by and under a deed of trust" from F. and his wife, the balance was invested in U. S. bonds. Subsequently the same parties, with defendant F. N., Jr., as party of the fourth part, entered into an agreement which recited the receipt by J., under the first deed of trust, of certain property "in trust for certain purposes therein mentioned" the sale of said property and the investment of the proceeds as stated, that said defendant was to be substituted as trustee in place of J., and the conveyance by the latter to said defendant of said house and lot and delivery of the bonds. By the terms of the agreement, in consideration of the transfer, F. and wife released J. from all claims and demands, and said defendant agreed to take said house and lot "and hold the same, as trustee, pursuant to the covenants and conditions in said trust deed contained in the place" of J. By the conveyance referred to J., "individually and as trustee," conveyed

all his "right, title and interest in and to the house and lot to said defendant, as trustee in place and stead" of J., "under said deed of trust." Said defendant thereafter acted as trustee until the death of the wife, which occurred after the two children named became of age. F. thereafter claiming a reversionary interest in the property so held by said defendant conveyed the same to plaintiffs. In an action to recover possession of said property, *held*, that the effect of the first deed and trust agreement was to create a valid trust in J.; that the reversionary interest in the land remained in the creator of the trust, and on the death of his wife reverted to him; that the land so conveyed was not exempted from the limitations and conditions of the trust by the subsequent deed and agreement between the same parties; that said limitations and conditions followed the property into which the estate was converted and it became subject to the same rule of reversion; and that, therefore, the *corpus* of the trust estate reverted to F., and passed under the conveyance from him to plaintiff. *Nearpass v. Newman.* 47

2. Also, *held*, that whatever effect might be ascribed to the quit-claim deed from F. to J., all of the interest thereby conveyed was reconveyed to said defendant F. N., Jr., by the last agreement, the original trust was redeclared and the whole property reconstituted a trust fund, subject to the limitations and conditions of the original agreement. *Id.*

SALES.

1. In an action to recover the purchase-price of goods manufactured for and delivered to defendant, the defense was that the goods were not such as the contract called for. The evidence on trial was conflicting as to the terms of the contract, the quality of the goods and their fitness for the use intended, and as to whether they corresponded with those ordered. It

appeared that plaintiff manufactured and delivered goods in quantity corresponding with the order; that, some faults in their quality having been alleged, he received them back and attempted to remedy the alleged defects and finally redelivered the whole quantity to defendant; that defendant still claimed that they did not correspond with the articles plaintiff contracted to make, and when the latter demanded payment refused, and that thereupon plaintiff demanded a return of the goods, to which defendant replied that he would not give them up, as he wished to consult counsel as to his right to keep them for reimbursement of damages. The trial court thereupon ordered judgment for plaintiff, holding that the refusal to return the goods amounted to an acceptance under the contract. *Held*, error; that the question was one of fact for the jury. *Norton v. Dreyfuss*. 90

2. The acceptance by a vendee of articles manufactured for him under an executory contract, after an opportunity to examine; precludes him from raising any objection as to defects which were visible and capable of discovery on inspection, unless there was a warranty of quality which was intended to survive acceptance. *Id.*
3. Where there is such a warranty the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the contract as a defense to an action for their price. *Id.*
4. *It seems*, however, the purchaser may not in the same action sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty. *Id.*
5. The word "sold" in a contract of sale of chattels does not necessarily import an executed contract. *Anderson v. Read*. 333
6. Where, by the terms of the contract, some material act remains

to be done by the vendor before he can insist upon making delivery or can claim payment, such word is to be construed as meaning "contracted to sell," and the contract is merely an executory one. *Id.*

7. So, also, where the contract contains no specification, identification, description or appropriation of the particular property, no title passes to the vendee; in order to pass the title the article, if not delivered, must be in some manner designated so that possession can be taken by the purchaser without any further act on the part of the vendor. *Id.*
8. Defendants' firm entered into a contract with the firm of R. W. L. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading, by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer, he agreed to accept the goods purchased of defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order, drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last of December or early in January, 1882. R. & Co. gave their notes as agreed for the purchase-price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum De L. gave his own notes and the acceptances of third persons to R.

& Co. in payment for the goods. R. & Co. soon after stopped payment and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid the purchase-price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods, *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co. under the contract, and inasmuch as against R. & Co., defendants had the right to refuse to deliver the goods without payment therefor, after that firm became insolvent, they had the same right as against De L. or his assignee. *Id.*

9. Also *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that defendants were not estopped from showing the fact that no title passed, or from denying the legal right of plaintiff, as assignee of De L., to a delivery of goods of the same character and quality as described. *Id.*

10. Also *held* (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that the question was one of law for the trial court, and that a submission thereof to the jury was error. *Id.*

SPECIFIC PERFORMANCE.

1. Plaintiff's complaint herein alleged, in substance, that, under the provisions of said act it became and still is the owner in fee and possessed of certain land described in the complaint; that under a statute authorizing it (Chap. 878, Laws of 1870, as amended by chap. 795, Laws of 1873), a sale of said land was made to defend-

ant and he entered into a contract to purchase, but that he has refused to take title or pay the purchase-money. Plaintiff asked for a specific performance. The answer admitted each and every allegation of the complaint, except it denied that the statutes mentioned were competent to vest in plaintiff the ownership of the land in question. *Held*, that the allegation of ownership in the complaint was equivalent to an averment of compliance with the terms of the act of 1861, *i. e.*, that the commissioner's report was confirmed and payment made to the owners of the land or their assent obtained by deed duly executed; that this averment was not denied by the answer, which simply put in issue the quantum of the estate acquired by the city; and as, if true, such averment would preclude the owners from thereafter questioning the validity of the act, its constitutionality could not be questioned here. *City Brooklyn v. Copeland.* 496

2. On the trial plaintiff's counsel asked the counsel for defendant if it was admitted that the steps required by the act for the taking of lands had been taken; the latter replied that it was, except that no admission was made that awards for the land were accepted by the owners under such circumstances as to operate as a voluntary grant, or to estop defendant from denying the sufficiency of the acts to vest title. *Held*, that this did not detract from the admission in the answer. *Id.*

STATUTES.

1. It is not a good objection to a statute prohibiting a particular act and making its commission a public offense; that the act was, before the enactment, lawful or even innocent. *People v. West.* 293

2. It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted. *Id.*

8. An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed in the title. *Id.*

— *Chap. 182, Laws of 1839.*
 — *Chap. 363, Laws of 1845.*
 — *Chap. 257, Laws of 1848.*
See Mayor, etc., v. Starin, 1.
 — *Chap. 863, Laws of 1873.*
 — *Chap. 589, Laws of 1874.*
See People ex rel. v. Comr's, 64.
 — *Chap. 907, Laws of 1869.*
See In re Clark v. Sheldon, 104.
 — *Chap. 320, Laws of 1872.*
See Woodruff v. Havemeyer, 129.
 — *1 R. S. 194, § 167.*
See Ellwood v. Northrup, 172.
 — *Chap. 179, Laws of 1830.*
See Dorrance v. Dean, 203.
 — *Chap. 207, Laws of 1850.*
See Swift v. P. M. S. Co., 206.
 — *Chap. 79, Laws of 1875.*
 — *Chap. 110, Laws of 1876.*
See In re F. P. Society, 251.
 — *Chap. 353, Laws of 1882.*
See People ex rel. v. Chapin, 265.
 — *Chap. 40, Laws of 1848.*
 — *Chap. 333, Laws of 1853.*
See Whitaker v. Masterton, 277.
 — *1 R. S. 337, § 1.*
See Vail v. L. I. R. Co., 283.
 — *Chap. 183, Laws of 1885.*
See People v. West, 293.
 — *Chap. 207, Laws of 1885.*
See People ex rel. v. R. W. & O. R. Co., 330.
 — *Chap. 8, Laws of 1864.*
 — *Chap. 72, Laws of 1864.*
 — *Chap. 41, Laws of 1865.*
See Parker v. Supervisors, 392.
 — *Chap. 427, Laws of 1853.*
See F. N. Bank v. Supervisors, 488.
 — *Chap. 340, Laws of 1861.*
 — *Chap. 373, Laws of 1870.*
 — *Chap. 795, Laws of 1873.*
See City of Brooklyn v. Copeland, 496.
 — *Chap. 574, Laws of 1871.*
 — *Chap. 625, Laws of 1871.*
 — *Chap. 547, Laws of 1874.*
See Fire Dept. v. A. S. Co., 566.
 — *Chap. 31, Laws of 1886.*
See People ex rel. v. N. Y. C. Pro-tectory, 604.
 — *Chap. 262, Laws of 1859.*
See Gage v. Vil. of Hornellsville, 667.
 — *Chap. 269, Laws of 1880.*
See People ex rel. v. Ass'rs of Greenburgh, 671.

— *Penal statutes to be construed strictly.*
See Whitaker v. Masterton, 277

See BANKRUPTCY.
 CONSTITUTIONAL LAW.
 LIMITATIONS OF ACTIONS.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STAY OF PROCEEDINGS.

Where, after an order requiring an infant plaintiff to file security for costs and staying proceedings until the order was complied with, and pending a motion to dismiss the complaint because of a failure to comply with the order, the court granted an order allowing plaintiff to prosecute the action as a poor person. *Held*, that the stay did not deprive the court of jurisdiction to make the second order; and that such order was an answer to the motion to dismiss. *Shearman v. Pope, 661*

STOCKHOLDER.

1. The unissued shares of stock of a corporation are not assets in its hands, and in the absence of any statutory provision, or provision of its charter, one to whom shares have been transferred by it gratuitously does not, by accepting them, become a debtor to the company or make himself liable to pay the nominal face of the shares as upon a subscription for the stock or a contract, and an action is not maintainable against him by a creditor of the corporation to compel him to pay for such shares. *Christensen v. Eno, 97*
2. So, also, where bonds of a corporation have been issued by it gratuitously to a stockholder, but no portion of its property or assets has been applied in payment thereof, the stockholder is not liable to account to creditors for the proceeds of the sale of said bonds by him. *Id.*

SUPERVISORS.

1. Under the provisions of the acts of 1864 and 1865 (chaps. 8 and 72, Laws of 1864; chap. 41, Laws of 1865), conferring upon boards of supervisors power to borrow money on the credit of their respective counties to pay bounties, etc., and to execute obligations for its payment, the power so conferred was not intended to be limited to a single exercise thereof, but said board was authorized to borrow money and to renew the county obligations from time to time for the purpose of paying or continuing the indebtedness created under said acts. *Parker v. Bd. Suprs.* 892

2. *It seems* that boards of supervisors have no inherent power to borrow money or to issue negotiable paper, but must find the authority therefor in some statute, given either expressly or by implication. *Id.*

3. In November, 1866, the board of supervisors of S. county passed resolutions providing for raising, by taxation, a certain amount of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." The debt so provided for, termed the town bounty debt, at that time amounted to over \$500,000, represented by a large number of separate obligations, a large portion of which matured in February thereafter. No other provision was made for the payment of the maturing obligations. Similar resolutions were passed at each annual session of the board down to 1875. *Held*, that the authority given was to be construed in reference to the circumstances, and was not limited to an extension of the then outstanding obligations, but authorized the county treasurer to borrow money to pay them as they matured, and to issue new obligations in renewal of those then existing or for the new loans. *Id.*

4. In each year from 1865 to 1875 the accounts of the treasurer,

which, with the vouchers accompanying them, showed that he had made new loans and issued new obligations, were audited without objection by a committee of the board. *Held*, the inference was irresistible that the board was cognizant of the facts, and its acquiescence in the assumption of power by the treasurer to borrow money and give new obligations, as a means of extending the debt, was cogent evidence that the authority intended to be conferred included these transactions. *Id.*

5. *It seems* any authority given to a county by the legislature to extend its indebtedness, includes the power to do it by borrowing money and substituting new obligations in place of the old ones. *Id.*

6. The town bounty debt, so-called, was incurred in pursuance of a resolution of the board of supervisors, authorizing the borrowing of money on the credit of the county, to be disbursed for bounties on the order of the supervisors of the respective towns. The amount so drawn by each supervisor, it was declared, should constitute a debt of his town, payable by taxation of its property. There was no vote of the electors of the town authorizing the debt as prescribed by the act of 1864 (§ 22, chap. 72, Laws of 1864). *Held*, that the debt was legally a debt of the county, not of the several towns; but that the authority of the treasurer extended to it, and it was immaterial that it was not described in the resolution with legal accuracy. *Id.*

7. In an action upon notes issued by the county treasurer to P., plaintiff's intestate, for moneys loaned, ostensibly to pay maturing obligations of the county, in pursuance of said resolutions of the board of supervisors, and in renewal of notes so given, it appeared that there was a fraudulent over-issue of notes by the county treasurer to a large amount; that notes were outstanding at the time of the annual meeting of the board

of supervisors in 1874 to the amount of \$138,631, while if the money raised by taxation had been honestly applied, and he had borrowed only sufficient to extend the portion of the debt he was directed to have extended, the whole debt would have been but \$30,801. It did not appear that the treasurer misapplied any of the monies for which the notes in suit were given, and at no time did the indebtedness the treasurer was authorized to extend fall short of the loans made by P., and the good faith of the lender was not questioned. *Held*, that the evidence failed to establish a defense to the notes; that as the authority given to the treasurer authorized transactions and dealings in form of the same precise character as those which took place between the treasurer and the payee of the notes, the presumption was that they were authorized; and if, in fact, they were not within the actual limits of the power, the burden was upon defendant to show it. *Id.*

8. It is immaterial in this regard whether the agency is a general one, or confined to a particular series of transactions for the principal. *Id.*

9. It was shown that in some years renewal notes were given to P. after the treasurer had renewed notes held by other parties exceeding in amount the debt which the board of supervisors had requested him to extend. *Held*, that this did not make out the defense; that there was as much reason for considering those other notes to be representatives of unauthorized loans, as there was for regarding as of that character the notes surrendered by P. on receiving the new notes. *Id.*

10. It was claimed that the resolutions of the board were invalid, because they assumed to delegate to the treasurer the judicial and legislative power of the board to determine the extent and amount of the liabilities of the county and to audit and allow the same. *Held*, untenable; as the authority

was to extend a debt already existing, not to create a new debt, or to pass upon or allow a disputed or doubtful claim. *Id.*

11. Also, *held*, that it was not necessary to present the claim to the board of supervisors for audit. *Id.*

12. Bonds and notes of a county, issued for loans authorized by law, are not open accounts for county charges which must be presented to the board of supervisors for audit. *Id.*

13. As to whether the county could be charged in case it had been affirmatively shown that the notes in question were fraudulently issued by the treasurer in excess of his authority, *quære*. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TITLE.

1. Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid. *Moors v. Kidder*. 32

2. Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor; the possibility of reverter merely is not an estate in land. *Vail v. L. I. R. R. Co.* 288

3. A deed conveyed, for a valuable consideration expressed, a certain strip of land described therein to a town and its "assignees forever," with covenants of warranty.

Following the description was the following: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." *Held*, that the deed conveyed the fee of the land, not an easement merely; that the clause restricting the use operated at most as a condition subsequent, and until the contingency happened the whole title was in the grantee. *Id.*

4. The word "sold" in a contract of sale of chattels does not necessarily import an executed contract. *Anderson v. Read.* 333

5. Where, by the terms of the contract, some material act remains to be done by the vendor before he can insist upon making delivery or can claim payment, such word is to be construed as meaning "contracted to sell," and the contract is merely an executory one. *Id.*

6. So, also, where the contract contains no specification, identification, description or appropriation of the particular property, no title passes to the vendee; in order to pass the title the article, if not delivered, must be in some manner designated so that possession can be taken by the purchaser without any further act on the part of the vendor. *Id.*

TOWNS.

The acquisition by a town of a fee in land for highway purposes by voluntary grant is within the powers conferred upon it by the statute. (1 R. S. 337, § 1, subd. 2.) *Vail v. L. I. R. R. Co.* 283

TRADE.

— *Validity of contracts in restraint of trade.*

See D. M. Co. v. Roeber. 473

TRIAL.

1. Plaintiff claimed to recover, among other things, for board furnished defendant; the latter answered denying the claim, and set up a counter-claim for board furnished by him to the plaintiff, who replied, denying the counter-claim. Plaintiff served a bill of particulars, which contained a charge against defendant for board and a credit to him for similar service of less amount. The trial was conducted by both parties upon the theory that the question of legal liability for board was an open one, and no objection was made by defendant to evidence offered to defeat his claim by plaintiff. The referee refused to allow either claim upon the ground that, while board was furnished as alleged, the relations of the parties were such that, in the absence of an express agreement, no promise to pay on either side could be implied. *Held*, that having reference to the form of the pleading and the issues raised, the credit given in plaintiff's bill of particulars was not a conclusive admission of legal liability to that amount; also, that if defendant had intended to rely upon the alleged admission, he should have raised the question on the trial when the bill might have been amended by striking out the credit; and, having failed so to do, he could not raise it on appeal. *Case v. Pharis.* 114

2. Plaintiff was lessee of certain premises, upon which was a hotel, formerly separated from defendant's premises by a strip of land thirty feet wide. This strip, in the deed under which defendant claimed, which was from W., the then owner of the whole property, was described as thereby dedicated for the purposes of a public street; the dedication was never accepted by the public. The deed from W. stated that the conveyance was for the purpose of a railroad depot only, and the grantee erected a depot upon the premises. W. devised the remaining property, one fourth to each of four devisees. On partition of the hotel property, not including the strip of thirty

- feet, two of the devisees became the owners. They subsequently quit-claimed to defendant's predecessor an undivided one-half of that portion of the strip in question, twenty feet wide, adjoining the land so conveyed by W. The deeds contained a provision to the effect that the conveyance was made on the express condition that the grantee, its successors or assigns should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed. The hotel was accessible from the depot across said strip, and depended largely for its patronage upon the passengers arriving at and departing from the depot. Defendant, on succeeding to the title of W.'s grantee, built a high and substantial fence the whole length of the strip, on the line between the twenty feet so conveyed and the remaining ten feet, with no opening therein, thus cutting off all passage between the hotel and depot. In an action, among other things, to restrain the continuance of the fence, plaintiff's complaint simply alleged that he was in possession of the hotel property. On trial defendant moved for a dismissal of the complaint on the ground that it did not show plaintiff to be a party or privy to any covenant in the deeds. The court, on motion of plaintiff, permitted an amendment of the complaint setting up the lease to plaintiff. *Held*, no error. *Avery v. N. Y. C. & H. R. R. Co.* 142
8. The complaint alleged the strip of land in question to be a public highway and the fence for that reason a nuisance. There were, however, averments to the effect that there existed an easement appurtenant to the hotel property, consisting of a right of way across some portion of the strip for passengers and their baggage, and that defendant in erecting the fence had left no opening, as of right it should have done. *Held*, that while the omission to state in the complaint that the easement claimed was reserved by the deeds might have been ground for a motion to make the complaint more definite, it did not defeat plaintiff's right to any relief by virtue of the reservation which he could not obtain on any other ground. *Id.*
4. Where an action to recover damages for an alleged interference with plaintiff's rights in a street was tried upon the theory that plaintiff owned the fee to the center of the street, or an easement therein, and no question was raised by defendant in reference thereto on the trial, *held*, that no such question could be raised upon appeal. *Drucker v. Manhattan R. Co.* 157
5. The alleged interference was by the construction upon the street and operation of an elevated railroad. *Held*, that evidence was competent that since the building of the railroad the trade and business of the street had fallen off and the amount of custom greatly diminished in volume and changed in character; that to measure and appreciate the individual loss to plaintiff the nature and extent of the general injury was properly and necessarily considered. *Id.*
6. The evidence tended to show that by reason of the falling off of business rental values on the street had seriously diminished, but it was also established that the result was due in part to a tendency of business to move "un town." *Held*, that although it could not be ascertained with definiteness and precision what proportion of the loss was caused by the wrongful acts of defendant, and the problem of damages could only be solved by taking into view the general loss and estimating out of it the part or share chargeable to defendant, this did not prevent a recovery; that when all reasonable facts and data had been furnished for consideration it was no defense to a wrong-doer that the judgment against him must involve more or less of estimate and opinion. *Id.*

7. Also, *held*, it was proper to prove and to take into consideration as elements of damages the impairment of plaintiff's easement of air, caused by smoke, gases, ashes and cinders from passing trains, the lessening of the easement of light, caused by the elevated road itself and the passage of trains, and the interference with convenience of access, caused by the drippings of oil and water. *Id.*

8. An agent of an insurance company, who, with the knowledge of the company, had been in the habit of filling in applications for insurance, wrote in an application that the building on which insurance was desired was occupied as a residence by a tenant. The statement made by the applicant was that the building was unoccupied, but when occupied it was by a tenant. The applicant, supposing his statement to have been written in correctly, signed the application without noticing the misstatement. The policy contained a provision to the effect that if the building insured should cease to be occupied as a dwelling, "or be so unoccupied at the time of effecting insurance and not so stated in the application," the policy shall be null and void "until the written consent of the company is obtained." On trial of an action upon the policy the referee granted a motion on behalf of plaintiff to amend the application so as to make the statement therein conform to that actually made by plaintiff. *Held*, no error. *Bennett v. Agricultural Ins. Co.* 243

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. F., for the purpose of making provision for the support of his wife and children, entered into a tripartite agreement with her and J., as trustee, whereby he conveyed to J., certain land, in trust, to sell and convey the same, invest the proceeds and pay the income to

her during her life. Subsequently the same parties entered into another agreement, which recited that F. desired to make still further provision for his wife and children, and for that purpose, on condition that the wife should perform certain covenants therein contained on her part, he agreed to quit-claim to J., "all his right, title and interest to and in" said land, and to pay J. \$300 a year for the support and education of each of two of said children until they respectively became of age; the deed and bill of sale to be put in *escrow*, to be delivered and to become operative and in full force and effect when the covenants on the part of the wife were performed; but to be returned to F., if not so performed. A quit-claim deed was executed by F., as agreed. J., thereafter sold the land, and with a portion of the proceeds purchased a house and lot which, by the terms of the deed, were conveyed to him "as trustee by and under a deed of trust" from F., and his wife; the balance was invested in U. S. bonds. Subsequently the same parties, with defendant F. N., Jr., as party of the fourth part, entered into an agreement which recited the receipt by J., under the first deed of trust, of certain property "in trust for certain purposes therein mentioned," the sale of said property and the investment of the proceeds as stated, the said defendant was to be substituted as trustee in place of J., and the conveyance by the latter to said defendant of said house and lot and delivery of the bonds. By the terms of the agreement, in consideration of the transfer, F., and wife released J. from all claims and demands, and said defendant agreed to take said house and lot "and hold the same as trustee, pursuant to the covenants and conditions in said trust deed contained, in the place" of J. By the conveyance referred to, J., "individually, and as trustee," conveyed all his "right, title and interest in and to the house and lot to said defendant as trustee in place and stead" of J., "under said deed of trust." Said defendant thereafter acted as trustee

until the death of the wife, which occurred after the two children named became of age. F. thereafter claiming a reversionary interest in the property so held by said defendant conveyed the same to plaintiffs. In an action to recover possession of said property *held*, that the effect of the first deed and trust agreement was to create a valid trust in J.; that the reversionary interest in the land remained in the creator of the trust and on the death of his wife reverted to him; that the land so conveyed was not exempted from the limitations and conditions of the trust by the subsequent deed and agreement between the same parties; that said limitations and conditions followed the property into which the estate was converted, and it became subject to the same rule of reversion; and that, therefore, the *corpus* of the trust estate reverted to F., and passed under the conveyance from him to plaintiff. *Nearpass v. Newman.* 47

2. Also, *held*, that whatever effect might be ascribed to the quitclaim deed from F. to J., all of the interest thereby conveyed was reconveyed to said defendant F. N., Jr., by the last agreement, the original trust was redeclared and the whole property reconstituted a trust fund, subject to the limitations and conditions of the original agreement. *Id.*

3. Where a conveyance of land to a religious corporation is absolute, without condition or reservation, it creates no trust beyond the duty imposed by law upon the corporation of using its property for the purposes contemplated in its creation. Such a trust is not fastened upon the land, but the corporation may, with the judicial consent, sell and convey a good title, the proceeds in such case taking the place of the land. *In re First Presb. Soc.* 251

4. The penalty imposed by the General Manufacturing Act (§ 12, chap. 40, Laws of 1848), upon trustees of a corporation organized under it for failure to make and file the

prescribed annual report, is not applicable to, and is not incurred by, a non-compliance with the provision of the act of 1858 (§ 2, chap. 838, Laws of 1858), which requires that in all statements and reports which are to be published of a company, any portion of the stock of which has been issued in payment for property, "it shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact." *Whitaker v. Masterton.* 277

5. An annual report filed by a manufacturing corporation stated the amount of its capital, and that all of it had "been paid in in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business and for which stock to the amount of the value thereof has been issued by the company." In an action by a creditor of the corporation against the trustees for alleged failure to make the prescribed report, *held*, that the report made was a sufficient compliance with the requirements of the act; that it was not necessary to specify therein how much of the capital was paid in cash and what amount in property, and that, therefore, the action was not maintainable. *Id.*

USURY.

1. The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defense. *Lewis v. Barton.* 70

2. An indorser of a promissory note is not estopped from setting up usury as a defense thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full consideration and subject to no defense of usury or otherwise, where it appears that when the note was transferred to the holder he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred. *Id.*

VENDOR AND PURCHASER.

1. Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid. *Moors v. Kidder.* 32
2. S and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co. and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, was thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B. & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. *Held*, that B. Bros. & Co., were owners of the property. *Id.*
3. In the ordinary course of business the shellac was brought to the custom house and into the "general order" stores. On application of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom house, and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff as security for a loan, the latter relying upon the representations of S. and the warehouse receipt. *Held*, that plaintiff acquired no title to the property; and that an action to recover possession thereof was not maintainable. *Id.*
4. Plaintiff conveyed to his son I., certain premises by deed, with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and, without the knowledge or consent of plaintiff, executed to defendant McK. a mortgage for \$5,000, the consideration therefor being, partly, certain claims held by McK. against I., and the balance a check payable to the order of I., which he transferred on the same day to plaintiff. McK. had knowledge at the same time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was, at the time of such assignment, in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. *Held*, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and

- the burden of proving good faith in the transaction was upon him, and, in the absence of such proof, plaintiff was entitled to the relief sought. *Seymour v. McKinstry*. 230
5. The lien of a vendor of real estate for unpaid purchase-money is good against the vendee and the whole world, unless waived or defeated by an alienation of the property by the vendee to a purchaser without notice. *Id.*
 6. In an action by the vendor to enforce his lien, as against a mortgage executed by the vendee, it is not necessary for the plaintiff to allege in his complaint that he has not waived his lien or that the defendant took with notice; waiver or want of notice must be set up in the answer and proved as a defense. *Id.*
 7. Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price, the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgage debt, and the remainder is liable as security merely. *Wilcox v. Campbell*. 325
 8. The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt. *Id.*
 9. This obligation on the part of the purchaser is not affected by its conveyance; and, if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused to him. *Id.*
 10. The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and if he fails so to do, and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Id.*
 11. The rule which requires a party exposed to injury or damage to make the loss as small as he reasonably can, does not require the grantee of the remainder to advance the money to pay the mortgage for the purpose of protecting himself and his land. *Id.*
 12. Defendants' firm entered into a contract with the firm of R. W. L. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer, he agreed to accept the goods purchased of defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order, drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last of December or early in January, 1882. R. & Co. gave their notes as agreed for the purchase-price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum De L. gave his own notes and the acceptances of third persons to R. & Co. in payment for the goods. R. & Co. soon after stopped payment and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid the purchase-price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods,

held (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co. under the contract, and inasmuch, as against R. & Co., defendants had the right to refuse to deliver the goods without payment therefor, after that firm became insolvent, they had the same right as against De L. or his assignee. *Anderson v. Read.* 353

WAREHOUSING.

S. and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B. & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co., and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, were thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. In the ordinary course of business the shellac was brought to the custom house and into the "general order" stores. On ap-

plication of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom house, and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff as security for a loan, the latter relying upon the representations of S. and the warehouse receipt. *Held*, that plaintiff acquired no title to the property, but the title thereto was in B. Bros. & Co.; and that an action to recover possession thereof was not maintainable. *Moors v. Kidder.* 89

WARRANTY.

1. Where there is a warranty of quality on sale of goods the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the contract as a defense to an action for their price. *Norton v. Dreyfuss.* 90
2. *It seems*, however, the purchaser may not in the same action sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty. *Id.*

WHARVES.

1. Defendants were the owners and consignees of certain cargoes of sugar which were transported to New York under bills of lading, by which the carrier agreed to carry them to that port "to be delivered within reach of the steamship's tackles" to defendants. This clause in each bill was followed by a provision giving the steamer the option to discharge cargo at New York or Brooklyn, the consignee to pay landing and wharfinger charges thereon, including storage, at specified rates. The vessel on which the sugar was shipped

- carried general cargoes, including other sugars. On reaching New York they stopped at the regular pier of the company and discharged part of their cargoes, and then under the option in the bills of lading proceeded to Brooklyn and landed the sugars upon plaintiff's wharves in that city, and within twenty-four hours they were delivered. Defendants were ready with lighters to receive the sugars direct from the vessel and demanded such delivery. *Held*, that plaintiffs were entitled to maintain an action to recover the landing and wharfinger's fees specified in the bills of lading; that the option contemplated, in case it was exercised, a delivery upon a wharf in Brooklyn, and defendants had no right to insist that the cargoes should be delivered from the side of the ship; also that the contract was enforceable by plaintiffs, as the receipt of the cargoes on their wharf was in legal effect a service rendered by plaintiffs upon employment of the carriers, duly authorized to contract for defendants for the service at the specified rates. *Woodruff v. Havemeyer.* 129
2. Also, *held*, that the provision of the act of 1872 (§ 2, chap. 320, Laws of 1872), in relation to rates and wharfage, etc., in the cities of New York and Brooklyn, which authorizes a charge specified for goods remaining on a wharf for every day after the expiration of twenty-four hours from the time of landing, could not be construed as prohibiting the owner of a private wharf from contracting for the landing or deposit of goods upon his wharf on such terms as might be agreed upon, or as requiring him to store goods for any time without compensation. *Id.*
3. The jurisdiction of the fire department of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, includes structures on the wharves and piers owned by the city as well as those owned by private individuals, (PECKHAM, J., dissenting.) *Fire Dept. v. Atlas S. S. Co.* 566
4. The jurisdiction given to the dock department over the wharves and piers belonging to the city, and the structures thereon, by the act of 1871 (§ 90, chap. 574, Laws of 1871), gives to that department exclusive charge and control, such as a private owner has of structures owned by him; it does not interfere with the building and fire law or the power of the officers having charge of the execution thereof. (PECKHAM, J., dissenting.) *Id.*
5. The history of legislation in relation to buildings and the prevention of fires in said city, given. *Id.*
6. Whether the fire department acts independently as a distinct entity, with corporate powers, or as an agency of the city, it is not estopped from claiming against a lessee of one of the city wharves obedience to the building laws, and all orders and regulations lawfully made, in pursuance thereof, by the fact that the lease contains provisions in contravention of those laws and orders. *Id.*
7. Accordingly, *held*, in an action against a lessee of a pier belonging to the city, to recover the penalty imposed by the act of 1871 (§ 82, chap. 625, Laws of 1871), because of a violation of the requirements of a permit granted by the board of examiners for the erection of a structure on said pier, that plaintiff was not estopped by a provision in the lease authorizing the structure to be erected in a manner different from said requirements. *Id.*

WITNESSES.

1. *It seems* that the provisions of the Code of Civil Procedure (§§ 870, 873), in reference to the examination of a party to an action before trial, do not absolutely bind the judge to whom application is made for such an examination to grant an order, although the affidavit presented in form conforms to the requirements of said provisions. *Jenkins v. Putnam.* 272

2. Where, from the nature of the action and the other facts disclosed, the judge can see that the examination is not necessary; that it is sought merely for annoyance or delay, he may, in his discretion, deny the application. *Id.*
3. Conceding the provision requiring the judge to make the order to be mandatory, it does not interfere with the power of the Supreme Court; it may, on motion, in the exercise of its discretion upon all the facts appearing, vacate the order and leave the party to take the examination on the trial. *Id.*





VENDOR AND PURCHASER.

1. Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase-price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase-price is paid. *Moors v. Kidder.* 32
2. S and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co. and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, was thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B. & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. *Held*, that B. Bros. & Co., were owners of the property. *Id.*
3. In the ordinary course of business the shellac was brought to the custom house and into the "general order" stores. On application of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom house, and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff as security for a loan, the latter relying upon the representations of S. and the warehouse receipt. *Held*, that plaintiff acquired no title to the property; and that an action to recover possession thereof was not maintainable. *Id.*
4. Plaintiff conveyed to his son I., certain premises by deed, with warranty, pursuant to and in reliance upon an agreement that I. should execute to a third party a first mortgage upon the premises for \$5,000, the amount of purchase-money unpaid, which sum was to be paid directly by the mortgagee to plaintiff. The proposed mortgagee declined to make the loan. I., however, recorded his deed, and, without the knowledge or consent of plaintiff, executed to defendant McK. a mortgage for \$5,000, the consideration therefor being, partly, certain claims held by McK. against I., and the balance a check payable to the order of I., which he transferred on the same day to plaintiff. McK. had knowledge at the same time, and before he advanced any of the consideration, that plaintiff claimed to be entitled to \$5,000 as part of the purchase-price. The mortgage was recorded, and shortly thereafter McK. sold and assigned the same to defendant S. for the sum of \$5,000. Plaintiff had remained and was, at the time of such assignment, in possession of the premises. In an action to have an equitable lien declared in plaintiff's favor prior to the lien of the mortgage, for the balance of purchase-money unpaid, S. failed to show that he had no notice of plaintiff's equitable rights. *Held*, that McK. was not a *bona fide* purchaser save for the amount paid by check; that plaintiff was not estopped from asserting his lien as against S. by reason of his conveyance to I.; that the fact that the premises were in the actual possession of plaintiff was sufficient to put S. upon inquiry, and

the burden of proving good faith in the transaction was upon him, and, in the absence of such proof, plaintiff was entitled to the relief sought. *Seymour v. McKinstry*. 230

5. The lien of a vendor of real estate for unpaid purchase-money is good against the vendee and the whole world, unless waived or defeated by an alienation of the property by the vendee to a purchaser without notice. *Id.*
6. In an action by the vendor to enforce his lien, as against a mortgage executed by the vendee, it is not necessary for the plaintiff to allege in his complaint that he has not waived his lien or that the defendant took with notice; waiver or want of notice must be set up in the answer and proved as a defense. *Id.*
7. Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price, the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgage debt, and the remainder is liable as security merely. *Wilcox v. Campbell*. 325
8. The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt. *Id.*
9. This obligation on the part of the purchaser is not affected by its conveyance; and, if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused to him. *Id.*
10. The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and if he fails so to do, and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Id.*
11. The rule which requires a party exposed to injury or damage to make the loss as small as he reasonably can, does not require the grantee of the remainder to advance the money to pay the mortgage for the purpose of protecting himself and his land. *Id.*
12. Defendants' firm entered into a contract with the firm of R. W. L. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer, he agreed to accept the goods purchased of defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order, drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last of December or early in January, 1882. R. & Co. gave their notes as agreed for the purchase-price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum De L. gave his own notes and the acceptances of third persons to R. & Co. in payment for the goods. R. & Co. soon after stopped payment and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid the purchase-price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods,

held (RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co. under the contract, and inasmuch, as against R. & Co., defendants had the right to refuse to deliver the goods without payment therefor, after that firm became insolvent, they had the same right as against De L. or his assignee. *Anderson v. Read.* 383

WAREHOUSING.

S. and B. Bros. & Co. entered into an agreement, in pursuance of which the latter issued a letter of credit to B. & Co., of Calcutta, authorizing that firm to value on B. Bros. & Co. by bills for an amount specified, and promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co., and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement further stated that all property purchased by means of such credit, together with the bills of lading for the same, were thereby pledged and hypothecated to B. Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand, with authority to take possession and dispose of the same at their discretion for their security and reimbursement." Against the credit of said letter B. & Co. drew their bill of exchange for the cost of 100 cases of shellac, and attached it to a bill of lading for the shellac running to the order of B. Bros. & Co., who accepted the bill of exchange and paid it at maturity. In the ordinary course of business the shellac was brought to the custom house and into the "general order" stores. On ap-

plication of S. the papers were indorsed in blank and delivered to him by B. Bros. & Co., for the sole purpose of enabling him "to enter them at custom house, and warehouse them for account of" B. Bros. & Co.; S., instead of doing this, entered the shellac in the name of his broker, obtained a warehouse receipt, and then pledged the property to plaintiff as security for a loan, the latter relying upon the representations of S. and the warehouse receipt. *Held*, that plaintiff acquired no title to the property, but the title thereto was in B. Bros. & Co.; and that an action to recover possession thereof was not maintainable. *Moors v. Kidder.* 82

WARRANTY.

1. Where there is a warranty of quality on sale of goods the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the contract as a defense to an action for their price. *Norton v. Dreyfuss.* 90
2. *R seems*, however, the purchaser may not in the same action sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty. *Id.*

WHARVES.

1. Defendants were the owners and consignees of certain cargoes of sugar which were transported to New York under bills of lading, by which the carrier agreed to carry them to that port "to be delivered within reach of the steamship's tackles" to defendants. This clause in each bill was followed by a provision giving the steamer the option to discharge cargo at New York or Brooklyn, the consignee to pay landing and wharfinger charges thereon, including storage, at specified rates. The vessel on which the sugar was shipped

carried general cargoes, including other sugars. On reaching New York they stopped at the regular pier of the company and discharged part of their cargoes, and then under the option in the bills of lading proceeded to Brooklyn and landed the sugars upon plaintiff's wharves in that city, and within twenty-four hours they were delivered. Defendants were ready with lighters to receive the sugars direct from the vessel and demanded such delivery. *Held*, that plaintiffs were entitled to maintain an action to recover the landing and wharfinger's fees specified in the bills of lading; that the option contemplated, in case it was exercised, a delivery upon a wharf in Brooklyn, and defendants had no right to insist that the cargoes should be delivered from the side of the ship; also that the contract was enforceable by plaintiffs, as the receipt of the cargoes on their wharf was in legal effect a service rendered by plaintiffs upon employment of the carriers, duly authorized to contract for defendants for the service at the specified rates. *Woodruff v. Havemeyer.* 120

2. Also, *held*, that the provision of the act of 1872 (§ 2, chap. 320, Laws of 1872), in relation to rates and wharfage, etc., in the cities of New York and Brooklyn, which authorizes a charge specified for goods remaining on a wharf for every day after the expiration of twenty-four hours from the time of landing, could not be construed as prohibiting the owner of a private wharf from contracting for the landing or deposit of goods upon his wharf on such terms as might be agreed upon, or as requiring him to store goods for any time without compensation. *Id.*

3. The jurisdiction of the fire department of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, includes structures on the wharves and piers owned by the city as well as those owned by private individuals, (PECKHAM, J., dissenting.) *Fire Dept. v. Atlas S. S. Co.* 566

4. The jurisdiction given to the dock department over the wharves and piers belonging to the city, and the structures thereon, by the act of 1871 (§ 99, chap. 574, Laws of 1871), gives to that department exclusive charge and control, such as a private owner has of structures owned by him; it does not interfere with the building and fire law or the power of the officers having charge of the execution thereof. (PECKHAM, J., dissenting.) *Id.*

5. The history of legislation in relation to buildings and the prevention of fires in said city, given. *Id.*

6. Whether the fire department acts independently as a distinct entity, with corporate powers, or as an agency of the city, it is not estopped from claiming against a lessee of one of the city wharves obedience to the building laws, and all orders and regulations lawfully made, in pursuance thereof, by the fact that the lease contains provisions in contravention of those laws and orders. *Id.*

7. Accordingly, *held*, in an action against a lessee of a pier belonging to the city, to recover the penalty imposed by the act of 1871 (§ 83, chap. 625, Laws of 1871), because of a violation of the requirements of a permit granted by the board of examiners for the erection of a structure on said pier, that plaintiff was not estopped by a provision in the lease authorizing the structure to be erected in a manner different from said requirements. *Id.*

WITNESSES.

1. *It seems* that the provisions of the Code of Civil Procedure (§§ 870, 873), in reference to the examination of a party to an action before trial, do not absolutely bind the judge to whom application is made for such an examination to grant an order, although the affidavit presented in form conforms to the requirements of said provisions. *Jenkins v. Putnam.* 272

2. Where, from the nature of the action and the other facts disclosed, the judge can see that the examination is not necessary; that it is sought merely for annoyance or delay, he may, in his discretion, deny the application. *Id.*
3. Conceding the provision requiring the judge to make the order to be mandatory, it does not interfere with the power of the Supreme Court; it may, on motion, in the exercise of its discretion upon all the facts appearing, vacate the order and leave the party to take the examination on the trial. *Id.*



